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7604
No. 12383

**United States
Court of Appeals**
for the Ninth Circuit.

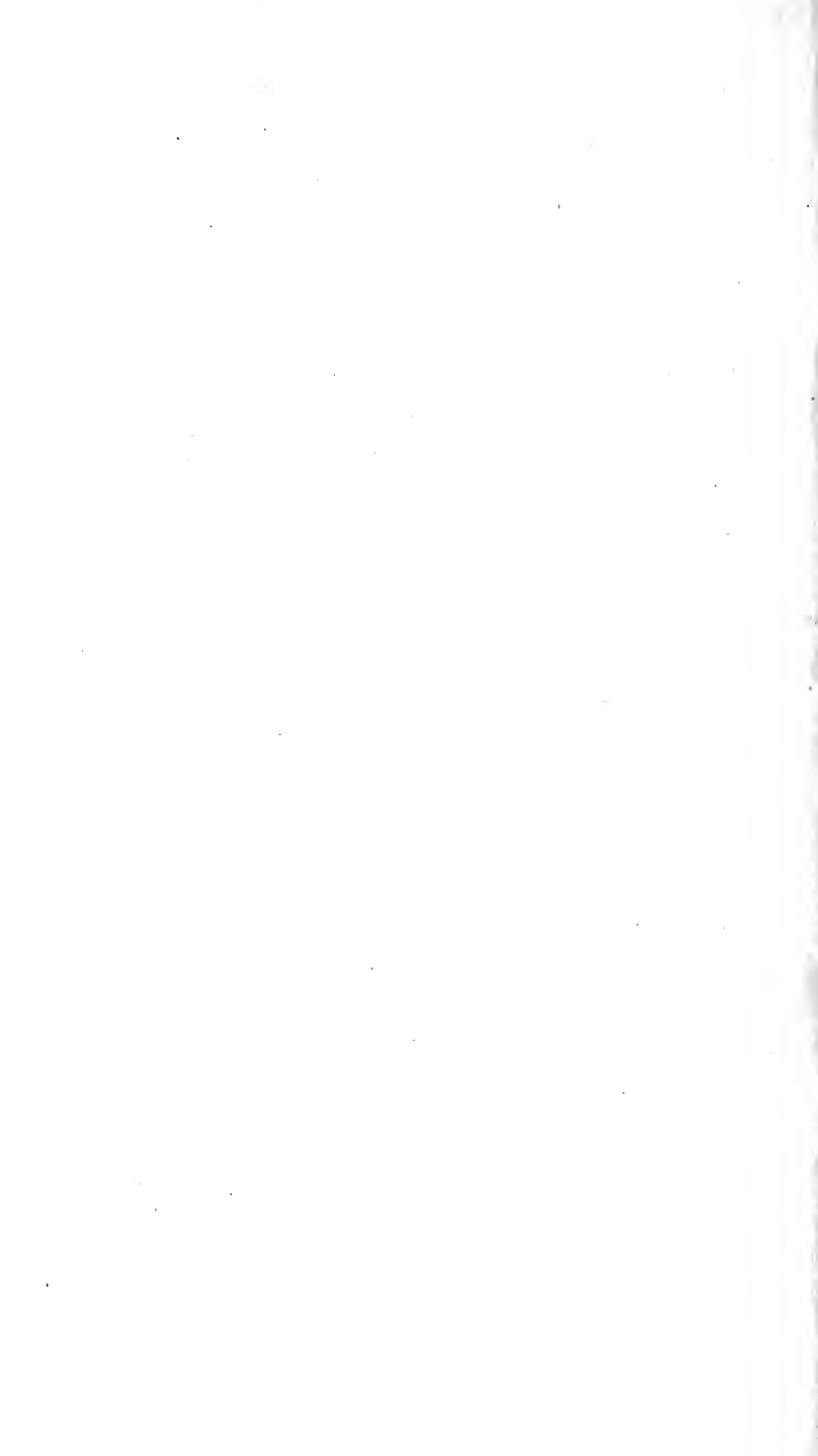
IVA IKUKO TOGURI D'AQUINO,
See vol. 7605 Appellant,
vs.
UNITED STATES OF AMERICA,
Appellee.

Transcript of Record
In Two Volumes
Volume I
(Pages 1 to 462)

**Appeal from the United States District Court,
Northern District of California,
Southern Division.**

FILED
MAY 4 1950

PAUL P. O'BRIEN,
CLERK



No. 12383

**United States
Court of Appeals**
for the Ninth Circuit.

IVA IKUKO TOGURI D'AQUINO,
Appellant,
vs.
UNITED STATES OF AMERICA,
Appellee.

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INDEX

[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in *italic*; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in *italic* the two words between which the omission seems to occur.]

	PAGE
Affidavit of Iva Ikuko Toguri D'Aquino.....	331
Affidavit in Support of Motions.....	130
Affidavit in Support of Motions for Bail.....	11
Appeal:	
Certificate of Clerk to Record on.....	865
Designation of Additional Contents of Record on.....	864
Designation of Contents of Record on.....	854
Notice of.....	334
Notice of Motion for Admission of the Defendant to Bail Pending.....	328
Order Dispensing With Payment of Fees and Costs of Printing Record on.....	334
Stipulation and Order That Original Papers and Exhibits Be Transmitted to Court of Appeals for Use on.....	863
Certificate of Clerk to Record on Appeal.....	865
Defendant's Proposed Instructions.....	280, 290
Demand for Additional Bill of Particulars.....	47

INDEX	PAGE
Demand for Bill of Particulars.....	35
Demand for Discovery and Inspection.....	40
Designation of Additional Contents of Record on Appeal.....	864
Designation of Contents of Record on Appeal..	854
Exhibits, Defendant's:	
Murayama Deposition:	
I—Letter Dated August 12, 1947..	608
No. 2—Letter to Mr. Murayama.....	610
Pinto Deposition:	
No. 1—Certificate of Consular Registry	
No. 90.....	745
2—Marriage Certificate.....	747
3—Record of Marriage.....	748
4—Certificate of Registration.....	751
5—Affidavit	752
6—Certificate of Consular Registry	
No. 159.....	753
8—Certificate of Consular Registry	
No. 190.....	755
Exhibits, Government's:	
Pinto Deposition:	
I—Memorandum	757
Schenk Deposition:	
I—Letter—Tokyo, 24 February 1949..	534

INDEX

PAGE

Indictment	2
Judgment and Commitment.....	327
Memorandum on Behalf of U. S. in Opposition, Defendant's Motions for a New Trial, Judgment of Acquittal, and in Arrest of Judgment	277

Minute Orders:

October 11, 1948—Arraignment and Oral Motion for Bail and Continuing Cause, Hearing on Motion That Defendant Be Admitted to Bail.....	8
October 14, 1948—That Defendant's Motion for Bail Be Denied and Providing That Marshal Provide Suitable Place of Con- finement	34
January 3, 1949—Denying Motion for Bill of Particulars, Motion to Dismiss Indict- ment and Motion to Strike Indictment— Motion for Discovery and Inspection Be Granted as to Request No. 7 but Denied as to Remaining Requests (Plea of "Not Guilty").....	114
March 14, 1949—Motion to Take Certain Depositions Be Granted and That Re- maining Motions Be Denied.....	164
April 25, 1949—Authorizing Issuance and Service of Subpoenas and Motion for	

INDEX

PAGE

Minute Orders (Continued):

List of Witnesses and Veniremen Be Continued—Ordering Case Be Continued	194
June 20, 1949—Granting Motion for Additional Expenses, etc.....	236
June 22, 1949—Quashing Subpoena Duces Tecum Issued to Mr. DeWolfe.....	245
August 12, 1949—That Oral Motion for Judgment of Acquittal Be Continued to August 13, 1949.....	247
August 13, 1949—Denying Defendant's Motion for Judgment of Acquittal.....	248
September 19, 1949—Denying Motion to Strike Certain Testimony; to Strike U. S. Exhibits Nos. 2 and 15; to Dismiss Indictment; and Motion for Acquittal...	251
September 26, 1949—Court's Instruction to Jury; Aileen McNamara, Excused for Further Service; Marshal Instructed to Provide Meals and Lodging for Jurors and Marshals, etc.....	252
September 27, 1949—Re Portions of Transcript and Exhibit Requested by and Delivered to Jury, etc.....	254
September 29, 1949—Re Jury Requesting and Receiving Certain Volumes of Testi-	

INDEX

PAGE

Minute Orders (Continued):

mony, and Further Instructions of the Court; Jury's Verdict and Special Findings, etc.....	255
October 6, 1949—Denying Motion for New Trial, Motion for Acquittal or New Trial, and Motion in Arrest of Judgment, Sentence	325
October 10, 1949—Denying Motion for Bail Pending Appeal.....	336
Motion for Acquittal or New Trial.....	262
Motion for Arrest of Judgment.....	261
Motion for Bill of Particulars.....	99
Notice of.....	98
Motion to Be Admitted to Bail.....	10
Notice of.....	9
Motion for Discovery and Inspection.....	78
Notice of.....	77
Motion to Dismiss Indictment on Defenses and Objections Capable of Determination Without Trial of General Issue.....	86
Notice of.....	85
Motion to Dismiss Indictment.....	54
Exhibit A—Warrant of Arrest.....	67

	INDEX	PAGE
Motion for Lists of Witnesses and Veniremen		173, 225
Notice of.....		172
Motion for New Trial.....		264
Motion for Order Authorizing and Directing Issuance of Service of Subpoenas Requiring Attendance of Witnesses at the Trial Herein at the Expense of the Government		117, 175, 196, 214
Notice of.....		116, 175, 195, 213
Motion for Order for Production, Examination and Inspection of Records and Scripts.....		249
Motion for Postponement of Time of Trial....		193
Notice of.....		192
Motion for Production of Documentary Evidence		228
Motion to Strike.....		51
Notice of.....		50
Motion for Supplemental Order Authorizing Additional Subsistence Expenses to Be Paid Defendant's Counsel for Attending Examinations of Witnesses.....		226
Names and Addresses of Attorneys.....		1
Notice of Appeal.....		334
Notice of Hearing Re Motions.....		116

INDEX	PAGE
Notice of Motion for Admission of the Defendant to Bail Pending Appeal.....	328
Notice of Motion to Dismiss Indictment.....	53
Order Denying Motion for Lists of Witnesses, etc.	212
Order Denying Seven Motions and Granting Defendant's Motion for Taking Depositions Abroad	165
Order Dispensing With Payment of Fees and Costs of Printing Record on Appeal.....	334
Order Granting Defendant's Motions for Order Authorizing and Directing Issuance and Service of Subpoenas of Defendant's Witnesses at Trial Herein at the Expense of the Government	208, 223
Order Granting Motion for Supplemental Order Authorizing Additional Subsistence Expenses to Be Paid by the Government to Defendant's Counsel for Attending Examinations of Witnesses	235
Notice of.....	234
Order Releasing Reporter's Transcript.....	862
Order Requiring Plaintiff to Supply Defendant With Lists of Veniremen and Witnesses.....	237
Order Staying Execution.....	330, 862
Points and Authorities in Support of Motion to Be Admitted to Bail.....	29

INDEX	PAGE
Points and Authorities in Support of Motion for New Trial.....	269
Points and Authorities in Support of Motion to Strike.....	53
Special Findings by the Jury.....	258
Stipulation and Order That Original Papers and Exhibits Be Transmitted to the U. S. Court of Appeals for Use on Appeal.....	863
Stipulation to Taking Oral Designations Abroad	171
Subpoena to Testify.....	238
Supplemental Authorities on Motion for New Trial	276
Supplemental Ground in Support of Motion Heretofore Filed for Acquittal or New Trial	275
Verdict	260
Witnesses:	
Depositions of:	
(See Note Re Depositions).....	337
Amamo, K. W.	
—direct	815
—cross	821
—redirect	823
—recross	824
Dumoulin, Heinrich	
—direct	759
—cross	766

Witnesses—(Continued):

Ghevenian, Lily

—direct	353
—cross	362
—redirect	371, 373
—recross	373

Hayakawa, Sumi Ruth

—direct	378
—cross	389
—redirect	393, 394

Kido, Unami

—direct	830
—cross	837
—redirect	840

Kodaira, Toshikatsu

—direct	671
---------------	-----

Matsui, Suisei

—direct	614
—cross	643
—redirect	651

Murayama, Ken

—direct	845
—cross	850

Murayama, Tamotsu

—direct	538
—cross	579
—redirect	602, 603
—recross	602, 606

INDEX

PAGE

Witnesses—(Continued):

Matsumiya, Kazuya

—direct	794
—cross	800
—redirect	802

Nakashima, Leslie Satoru

—direct	656
—cross	664
—redirect	666

Noda, George

—direct	339
—cross	344

Okada, Katsuo

—direct	771
—cross	782
—redirect	786

Ozasa, George

—direct	433
—cross	445
—redirect	548
—recross	460

Pinot, J. A. Abranches

—direct	727
—cross	738
—redirect	743

Saisho, Foumy

—direct	400
—cross	408

INDEX

PAGE

Witnesses—(Continued):

—redirect	412
—recross	412
Schenk, Nicolas	
—direct	464
—recross	533
Tillitse, Lars Pedersen	
—direct	806
—cross	810
Yanagi, Masaaki	
—direct	417
—cross	426

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Attorneys for the Plaintiff and Appellee.

In the Southern Division of the United States District Court, for the Northern District of California.

No. 31712-R

UNITED STATES OF AMERICA,

Plaintiff,

vs.

IVA IKUKO TOGURI D'AQUINO,

Defendant.

INDICTMENT

Treason (Title 18 U.S.C., Sec. 1)

The Grand Jurors for the United States of America duly impaneled and sworn in the Southern Division of the United States District Court for the Northern District of California and inquiring in and for that District and Division, upon their oaths present:

1. That Iva Ikuko Toguri D'Aquino, whose full and true name is to said Grand Jurors unknown, other than as hereinabove stated, hereinafter called "said defendant," was born in Los Angeles County, California, on July 4, 1916, and she has been at all times herein mentioned and is now a citizen of the United States of America and a person owing allegiance to the United States of America.

2. That said defendant, at Tokyo, Japan, and other places within the Empire of Japan, and out-

side the jurisdiction of any particular state and district of the United States, continuously and at all times beginning on or about the 1st day of November, 1943, and continuing thereafter up to and including the 13th day of August, 1945, under the circumstances and conditions and in the manner and by the means hereinafter set forth, she then and there being a citizen of the United States and a person owing allegiance to the United States, in violation of said duty of allegiance, did knowingly, wilfully, unlawfully, feloniously, intentionally, traitorously and treasonably adhere to the enemies of the United States, and more particularly, to wit, the Imperial Japanese Government, with which the United States at all times since December 8, 1941, and during the times set forth in this indictment, has been at war, and the Broadcasting Corporation of Japan and the officials and employees thereof, giving to the said enemies of the United States aid and comfort within the United States, Japan and elsewhere, that is to say:

3. That the aforesaid adherence of said defendant and the giving of aid and comfort by her to the aforesaid enemies of the United States during the period aforesaid consisted:

(a) Of working as a radio speaker, radio announcer, radio script writer, and as a broadcaster of recorded music in the short wave radio broadcasting station of the Broadcasting Corporation of Japan, a company controlled by the Imperial Japanese Government, which work included the prepa-

ration and composition of radio scripts, talks and announcements, the announcing of the same, and the announcing and introduction of musical recordings and talks for broadcast by radio from Japan to members of the armed forces of the United States and their allies in the Pacific Ocean area, and to people elsewhere.

(b) Of working as a composer and organizer of radio broadcasting programs for subsequent broadcast by radio from Japan to members of the armed forces of the United States and their Allies in the Pacific Ocean area and to people elsewhere.

That the aforesaid activities of said defendant were intended to destroy confidence in the war effort of the United States and its Allies, to undermine and lower American and Allied military morale, to create nostalgia in the minds of the American and Allied armed forces, to create war weariness among members of the American and Allied armed forces, to discourage members of the American and Allied armed forces, and to impair the capacity of the United States to wage war against its enemies.

4. And the Grand Jurors aforesaid upon their oaths aforesaid do further present that said defendant, in the prosecution, performance and execution of said treason and of said unlawful, traitorous and treasonable adhering and giving aid and comfort to the enemies of the United States as aforesaid, at the several times hereinafter set forth in the specifications hereof (being times when the United States was at war with the Imperial Jap-

anese Government), did knowingly, wilfully, unlawfully, feloniously, traitorously and treasonably and with treasonable intent in her to adhere to and give aid and comfort to said enemies, perform, do and commit certain overt and manifest acts which gave aid and comfort to said enemies, that is to say:

1. That on a day between March 1, 1944, and May 1, 1944, the exact date being to the Grand Jurors unknown, said defendant, at Tokyo, Japan, in the offices of the Broadcasting Corporation of Japan, did discuss with another person the proposed participation of said defendant in a radio broadcasting program.

2. That on a day between March 1, 1944, and June 1, 1944, the exact date being to the Grand Jurors unknown, said defendant, at Tokyo, Japan, in the offices of the Broadcasting Corporation of Japan, did discuss with employees of said corporation the nature and quality of a specific proposed radio broadcast.

3. That on a day between March 1, 1944, and June 1, 1944, the exact date being to the Grand Jurors unknown, said defendant, at Tokyo, Japan, in a studio of the Broadcasting Corporation of Japan, did speak into a microphone regarding the introduction of a program dealing with a motion picture involving war.

4. That on a date between August 1, 1944, and December 1, 1944, the exact date being to the Grand Jurors unknown, said defendant, at Tokyo, Japan,

did speak into a microphone in a studio of the Broadcasting Corporation of Japan referring to enemies of Japan.

5. That on a day during October, 1944, the exact date being to the Grand Jurors unknown, said defendant, at Tokyo, Japan, in the offices of the Broadcasting Corporation of Japan, did prepare a script for subsequent radio broadcast concerning the loss of ships.

6. That on a day during October, 1944, the exact date being to the Grand Jurors unknown, said defendant, at Tokyo, Japan, in a broadcasting studio of the Broadcasting Corporation of Japan, did speak into a microphone concerning the loss of ships.

7. That on or about May 23, 1945, the exact date being to the Grand Jurors unknown, said defendant, at Tokyo, Japan, in the offices of the Broadcasting Corporation of Japan, did prepare a radio script for subsequent broadcast.

8. That on a day between May 1, 1945, and July 31, 1945, the exact date being to the Grand Jurors unknown, said defendant, at Tokyo, Japan, did speak into a microphone in a studio of the Broadcasting Corporation of Japan, and did then and there engage in an entertainment dialogue with an employee of the Broadcasting Corporation of Japan for radio broadcast purposes.

That said defendant committed each and every one of the overt acts herein described with trea-

sonable intent and for the purpose of, and with the intent in her to adhere to and give aid and comfort to the Imperial Japanese Government, and to the Broadcasting Corporation of Japan and the officials and employees thereof, enemies of the United States, and said defendant committed each and every one of said overt acts contrary to her duty of allegiance to the United States and to the form of the statute and Constitution in such case made and provided, and against the peace and dignity of the United States.

That the Northern District of California was the Federal Judicial District into which the defendant was first brought shortly prior to the date of the return of this indictment.

A True Bill.

/s/ JOHN P. JONES,
Foreman.

/s/ FRANK J. HENNESSY,
U. S. Attorney,

/s/ TOM DE WOLFE,
/s/ JOHN B. HOGAN,
Special Assistants to the
Attorney General.

Presented in open court and ordered Filed.

[Endorsed]: Filed October 8, 1948.

District Court of the United States, Northern
District of California, Southern Division

At a Stated Term of the District Court of the United States for the Northern District of California, Southern Division, held at the Court Room thereof, in the City and County of San Francisco, on Monday, the 11th day of October, in the year of our Lord one thousand nine hundred and forty-eight.

Present: The Honorable Louis E. Goodman,
District Judge, Sitting for and on Behalf
of Honorable Michael J. Roche, District
Judge.

[Title of Cause.]

(Minute Order Entry on Arraignment and Oral Motion for Bail and Continuing Cause to Oct. 14 at 1:00 P.M. for Hearing on Motion that Defendant Be Admitted to Bail.)

Now comes the United States Marshal and produced the defendant, Iva Ikuko Toguri D'Aquino, in open Court pursuant to provisions of bench warrant heretofore issued. Wayne Collins, Esq., appeared as attorney for defendant. Tom De Wolfe, Esq., Special Assistant to the Attorney General, and Hon. Frank J. Hennessy, United States Attorney, were present for the United States.

On motion of Mr. Hennessy, the defendant was called for arraignment. The defendant was duly informed of the return of the Indictment by the

United States Grand Jury for the Northern District of California, at San Francisco, charging defendant with violation of Title 18 U.S.C., Sec. 1, (treason). The defendant was asked if she was the person named therein, and upon her answer that she was and that her true name was as charged, thereupon Mr. Collins waived her reading of the Indictment and copy thereof was handed to her. The defendant stated that she understood the charge against her.

Mr. Collins made an oral motion that the defendant be admitted to bail.

Ordered that this case be continued to October 25, 1948, to plead; and October 14, 1948, at 1 p.m., for hearing of motion that defendant be admitted to bail.

Further ordered that the defendant be admitted to the custody of the United States Marshal.

[Title of District Court and Cause.]

NOTICE OF MOTION

To Frank J. Hennessy, U. S. Attorney, Attorney
for Plaintiff:

You will please take notice that, by order of this Court duly made and entered on October 11, 1948, the defendant's oral motion made in open court on said date to be admitted to bail, which said motion defendant's counsel then and there stated would

be followed by the filing of a formal written motion therefor, copy of which is attached hereto, by an order of said court duly made on said date was set for hearing and argument before the said Court, Hon. Louis E. Goodman, presiding, for Thursday, October 14, 1948, at the hour of 1 o'clock p.m. of said day.

s/ WAYNE M. COLLINS,
Attorney for Defendant.

[Title of District Court and Cause.]

MOTION TO BE ADMITTED TO BAIL

Defendant moves the Court, under Title 18 USCA, Sec. 597, and Rule 46 (a) of the Rules of Criminal Procedure for the District Courts of the United States, to be admitted to bail.

This motion will be made on the oral motion heretofore made, the pleadings herein, this motion, notice thereof, affidavit and points and authorities in support thereof.

/s/ WAYNE M. COLLINS,
Attorney for Defendant.

Receipt of a copy of the above motion, notice thereof, affidavit and points and authorities in support thereof, are admitted this 15th day of October, 1948.

/s/ FRANK J. HENNESSY,
Attorney for Plaintiff.

AFFIDAVIT IN SUPPORT OF MOTION
FOR BAIL

The defendant, Iva Ikuko Toguri D'Aquino, an adult female, now resides and continuously ever since about July 25, 1941, has resided in Tokyo, Japan, and, on April 19, 1945, there was lawfully united in marriage to one, Felipe J. D'Aquino, a national and citizen of Portugal and resident in Tokyo, Japan, according to the rites of the Roman Catholic faith, by Father John Baptiste Kraus, a duly ordained priest of the Jesuit Order of the Roman Catholic Church, at Sophia University Chapel in Tokyo, Japan, and she thereby and thereupon, pursuant to the law of Portugal, as also the law of Japan, as also by the law of all other civilized nations and by international law, became and ever since then continuously has been and now is a national and citizen of Portugal and as such within the exclusive lawful jurisdiction of the Government of Portugal while resident in Japan and, as such a foreigner lawfully residing in Tokyo, Japan, was and is entitled to the protection of the laws of Japan, and was at all of said times and now is without the lawful jurisdiction of the United States; that by reason of the foregoing, at all times since her said marriage, which ever since has been and now is in full force and effect, she continuously has been and now is a bona fide resident of Japan, residing therein at 396 Ikejiri Machi, Setagaya-Ku, Tokyo, with her said husband, and a domiciliary, national and citizen of Portugal.

While so residing with her husband in Tokyo, as aforesaid, defendant forcibly was seized by agents of the United States, without legal authority or jurisdiction, at Yokohama, Japan, and was subjected to arrest, detention and questioning on or about September 5th and 6th, 1945, and thereafter was released on said September 6, 1945.

While so residing with her husband in Tokyo, as aforesaid, defendant forcibly was seized by agents of the United States, whom affiant is informed and believes were acting under the orders of the Attorney General of the United States, on October 17, 1945, and was taken, by them, from her said home and husband and confined to the Yokohama Prison in Yokohama, Japan, where she was held until November 16, 1945, when she was transferred to Sugamo Prison in Tokyo, Japan, where she remained until she was released therefrom by said authorities on October 25, 1946. While so detained and imprisoned she was, for approximately three months, held incommunicado by said authorities from her husband and visitors and without being afforded any opportunity whatever to obtain counsel or the assistance of any friend. The said arrest and imprisonment were wholly without authority of law and without valid process having issued therefor.

Thereafter, on August 26, 1948, defendant again was forcibly and unlawfully seized and arrested by agents of the United States, acting under orders of the Attorney General of the United States, with-

out any notice thereof being given by any of them or by the United States to the Government of Portugal, or to any of its diplomatic or consular officers, albeit they knew she and her said husband both were nationals and citizens of Portugal; and thereupon said agents, so acting under said orders, took her into custody, albeit without lawful right, sanction, jurisdiction, authority or process therefor, and imprisoned her in the said Sugamo Prison in Tokyo, Japan, and thereafter, by agents of the United States, was forcibly taken aboard the S.S. General F. H. Hodges, a United States transport vessel, in Yokohama Harbor, in custody of said agents, and said vessel thereafter sailed therefrom to the harbor of San Francisco, California; when and while said vessel, on September 25, 1948, there was in progress of docking, the defendant was seized aboard said vessel by agents of the U. S. Federal Bureau of Investigation, one of whom was Fred Tillman, a special agent, F.B.I., the names of the four or five others being unknown to affiant, upon a purported warrant of arrest issued upon a complaint filed in this Court on September 25, 1948, being numbered and entitled Commissioners' Docket No. 11, Case No. 5136, affiant being of the opinion said purported warrant issued and said complaint was filed before said vessel docked, as aforesaid; that, thereupon, defendant was brought before United States Commissioner Francis J. Fox in the Post Office Building, San Francisco, California, where, on her arrival at approximately

11:40 a.m., in custody, defendant formally was arrested by Hon. George Vice, U. S. Marshal for this District, and thereupon, said Commissioner ordered defendant into the custody of said Marshal and continued her hearing on said complaint to October 7, 1948, affiant then and there appearing as counsel for defendant; thereafter, on said October 7, 1948, said hearing was continued to October 14, 1948, with the consent of affiant, defendant's counsel, in order to enable the grand jury for this district to complete its inquiry into said matter.

On September 25, 1948, affiant was conferring with his client, the defendant, at her place of detention under the aforesaid order of said Commissioner, to wit, County Jail No. 3, Dunbar and Washington Streets, San Francisco, California, at approximately 3:30 p.m., when he was informed by the matron in charge of said jail that he would have to leave because a deputy U. S. Marshal was coming to take her to the U. S. Marshal's office in the Post Office Building, San Francisco, and it was necessary for defendant to change from prison to civilian garb. That affiant protested said interference with the privileged conference between affiant and defendant and thereupon left said jail and was admitted to the office of County Jail No. 2 in the same building where he telephoned Market 1-2500 and asked the operator at said number to connect him with the U. S. Marshal's office and thereafter was informed by her that there was no answer to her ring and thereupon affiant requested

her to ring the U. S. Attorney's office and the telephone of Thomas DeWolfe and John Hogan, Esqs., Special Assistant Attorney's General in that office and thereafter was informed that none of said telephones answered her rings and that the Marshal's and U. S. Attorney's offices were closed as it was Saturday afternoon;

Thereupon affiant returned to the corridor outside County Jail No. 3 where defendant was lodged and waited and at approximately 3:55 p.m. Deputy Marshal James Eagan appeared, was admitted to said jail and emerged with defendant in his custody. I joined them and we entered an automobile of the Federal Bureau of Investigation driven by John Eldon Dunn, special agent of that bureau, who drove us to the Federal Office Building, San Francisco, where we entered the office of that Bureau and there agents of that Bureau, acting under the orders of the aforesaid Thomas DeWolfe and John Hogan, holding defendant in duress and subjecting her to duress, over her and my protests, secretly attempted to question her in a room from which affiant was excluded. Thereafter, on Monday, September 27, 1948, affiant filed a formal protest with said Commissioner, Marshal, Special Assistant Attorneys General, agents of the said Bureau, and others, a copy of said written protest being attached hereto and incorporated herein.

The defendant is an indigent; aside from used clothing and a few personal effects, the reasonable value of which does not exceed \$25.00, she pos-

sesses the following assets only, viz., the equivalent of approximately \$100 in Japanese yen which is on deposit on the Postal Savings Bank in Tokyo, and a remote claim of right, subservient to the right of the Alien Property Custodian, in and to certain real property situated in Los Angeles County, California, which property has an approximate value of \$3,500, the interest of defendant therein, however, being at most a disputable claim and hence of substantially no value.

Defendant is a person of good moral character and has not heretofore been accused of any crime.

It will be necessary for affiant, in preparing the defense of defendant, to interview witnesses, whose number may exceed one hundred (100) persons; it will be necessary for counsel to confer with defendant in connection with each such witness to be interviewed; it is essential to her said defense that defendant personally see each witness and talk to each such witness in the presence of her counsel; such interviews are impossible while defendant is detained in said County Jail No. 3, by reason of the fact she there is held incommunicado from all persons except her father, sister and affiant; no person other than counsel is there permitted to visit and see defendant face to face; defendant's father and sister there are not permitted to see her features nor could any of her witnesses by reason of the fact that were they to be allowed to visit her they could speak to her only through double

iron mesh wires which obscures and prevents the visibility of defendant and such persons; the closed section of the room there reserved for counsel to interview clients is tiny, encased in glass, lacks ventilation, and counsel and client are separated by a bench-like desk and a partition of glass approximately two and one-half feet high mounted thereon, all of which render consultations difficult;

By reason of the fact she is detained in said County Jail No. 3 where at all hours of the night arrested women are incarcerated and make noise, it is practically impossible for defendant to obtain restful sleep, by reason of which she grows increasingly nervous and ill while under tension. Defendant is frail and weighs approximately 110 pounds. On January 5, 1948, she lost her baby at birth. She suffers from recurrent arthritis.

There is no danger that defendant, if admitted to reasonable bail, will depart from the jurisdiction of the court; defendant and her counsel are willing, if the court sees fit so to provide that she be required to report periodically to the court or any agent who may be designated by the court, pending the final outcome of the cause.

/s/ WAYNE M. COLLINS,
Affiant.

Subscribed and sworn to before me this thirteenth day of October, 1948.

/s/ JANE M. DAUGHERTY,

Notary Public in and for the City and County of
San Francisco, State of California.

Wayne M. Collins
Attorney at Law

Mills Tower, 220 Bush Street
San Francisco 4, California
Garfield 1-1218

September 27, 1948.

Hon. Francis J. Fox, U. S. Commissioner, San
Francisco, Calif.

Hon. George Vice, U. S. Marshal, San Francisco,
Calif.

Hon. Tom C. Clark, U. S. Attorney General, Wash-
ington, D. C.

John Hogan, Special Asst. Attorney General, San
Francisco, Calif.

Thomas De Wolfe, Special Asst. Attorney General,
San Francisco, Calif.

H. M. Kimball, Agent in Charge, U. S. F.B.I., San
Francisco, Calif.

John Eldon Dunn, Special Agent, F.B.I., San Fran-
cisco, Calif.

Fred Tillman, Special Agent, F.B.I., San Fran-
cisco, Calif.

William Simon, Special Agent, F.B.I., San Fran-
cisco, Calif.

R. C. Kopriva, Special Agent, F.B.I., San Francisco, Calif.

Gentlemen:

Re: U. S. v. Iva Toguri D'Aquino, Com.

Docket No. 11, Case No. 5136.

U. S. District Court, Northern District of California, Southern Division.

On last Saturday morning, September 25, 1948, near noon, I appeared as counsel for Mrs. Iva Toguri D'Aquino at her arraignment before U. S. Commissioner Francis J. Fox on a purported charge of a violation of Title 18, U. S. Code, Sec. 1, on a complaint, wholly insufficient on its face for failing to state a public offense, filed by John Eldon Dunn, special agent of the F.B.I., in the U. S. District Court for the Northern District of California, Southern Division. During the course of that proceeding I orally and openly instructed Mrs. D'Aquino, my client, not to talk to or discuss the charges therein contained with any officers, agents, representatives, servants or employees of the U. S. Government or any other person or persons and not to make any verbal or written statement to any such person or persons and not to answer any questions that might be put to her by any such person or persons without first consulting me.

Thereafter, near the close of said proceeding, I orally requested the said Commissioner to inform me where my client was to be taken at the close

of the proceeding and he informed me that she was in custody of the U. S. Marshal and would be taken by the U. S. Marshal to his office in the Post Office Building from whence she would be taken to San Francisco County Jail No. 3. The Hon. George Vice, U. S. Marshal, then and there orally confirmed that statement to me. Thereupon I asked whether she was to be taken from his custody to the office of the F.B.I. for questioning purposes, inasmuch as I had heard a statement from someone in the hearing room that such a purpose was intended, and was answered that she would not so be taken. Thereupon, I orally informed those present that I protested against any removal of my client from said custody and protested against any intended taking of her to any office of the F.B.I. or before any agent or agents of the F.B.I. or any other governmental officers or agencies for any purposes whatsoever without judicial process thereon first issuing and without advance notice to me and thereupon I stated to the agents of the U. S. then and there present that my client would not discuss the case or charges with any officer, agent, or employee of the Government and asked them not to seek so to do. The Hon. Francis J. Fox, U. S. Commissioner, the Hon. George Vice, U. S. Marshal, Thomas De Wolfe, attorney and Special Assistant Attorney General, and John Eldon Dunn, special agent of the F.B.I., among other governmental officers and agents, were present at said time and place.

Thereafter my said client was escorted to the U. S. Marshal's office in the Post Office Building and, shortly thereafter, was escorted by U. S. Deputy Marshal, by automobile, to S. F. County Jail No. 3, where she was confined without bail by order of U. S. Commissioner Francis J. Fox.

Thereafter, at about 2:40 p.m. of said day, I went to said Jail and was admitted to confer with my client. My conference with my client was interrupted at approximately 3:30 p.m. by the matron-in-charge who informed me she had just received a telephone call from the U. S. Marshal's office that a deputy marshal was coming in an automobile to take my client to the U. S. Marshal's office and that, for said reason, my conference would have to be terminated because she had to arrange for Mrs. D'Aquino to change from her prison garb to civilian clothes for that purpose and, although I orally protested on the ground the Marshal's office was closed on Saturday afternoon and that no right existed to remove her from the jail without being so authorized by judicial process, for any examination purposes whatsoever and that no such process had or could have been issued Saturday afternoon because the courts were closed and no notice had been given to me of any such intended removal for such purposes and that any such removal was unauthorized and violative of my client's rights, she informed me she was acting under orders and would obey those orders. Thereupon I was escorted to the door and then took the elevator to the next floor, County

Jail No. 2, where I was permitted to enter and there telephoned Market 1-2500 and asked the operator to connect me with the U. S. Marshal's office. The telephone operator informed me that she tried to ring his office, that there was no answer, that the Marshal's office was closed Saturday afternoon. I requested her to connect me with the U. S. Attorney's office and she thereafter informed me that she had rung there and received no answer. Thereupon I requested her to ring the telephone of Mr. John Hogan and Mr. Thomas De Wolfe, Special Assistant Attorneys General, and thereafter she told me that neither of them answered her rings. Thereupon I returned to the 3rd Floor of that building and waited in the corridor outside County Jail No. 3 for the arrival of the U. S. Deputy Marshal.

At approximately 3:55 p.m. on said Saturday, James Eagan, Deputy U. S. Marshal, appeared and gained admittance to that Jail. My client thereupon was delivered over to him and I accompanied them down the elevator, through the courtyard and the alley leading north to Washington Street to a parked dark (FBI) sedan in which John Eldon Dunn, special agent of the F.B.I., was sitting in the rear seat. Thereupon Mr. Eagan entered the car and sat in the front seat. Mr. Dunn thereupon drove east on Washington Street and turned and drove south on Montgomery Street, and parked at the curb in front of the northern end of the Commercial Union Building, 315 Montgomery, to leave

the car, as he said at the time to buy some cigarettes in the Pacific National Bank Building lobby. He returned in about four minutes without, however, exhibiting any such purchase, and thereupon drove the car to the main center entrance of the Federal Office Building in San Francisco and parked the car near that entrance. Thereupon we entered that building, took the elevator to the 4th Floor and entered the office of the F.B.I. where Mrs. D'Aquino and I were invited to be seated in the reception room.

Thereupon Mr. R. C. Kopriva of the F.B.I. informed me that Mrs. D'Aquino had been brought there for questioning. I asked him who had ordered her brought there and who the persons were who intended to question her. He informed me he was not permitted to inform me of these matters. I told him that I had instructed my client not to answer any questions whatever for any person whomsoever and then and there told her that I advised her not to answer any questions whatever, upon my advice, and she stated she would rely upon my advice. I then informed him orally that she would not answer any questions or talk to anyone about the case, that the seizure of my client from the County Jail No. 3 was highly improper; that the seizure had interrupted a conference I then was having with her; that she was in the custody of the U. S. Marshal, an adjunct of the U. S. District Court, and not in that of the Special Assistant Attorneys General, the F.B.I., or of any other

U. S. officers, agents or agency; that it was an unwarranted interference by executive officers with the judicial branch of the U. S. Government; that I had not been notified in advance by any of them or anyone of her intended removal from the said jail for interrogation purposes or of any questions that were to be put to her; that their conduct in removing her from that jail to the office of the F.B.I. was an interference with the privileged relationship of client and attorney existing between Mrs. D'Aquino and me and an unlawful and outrageous interference with her constitutional rights; that I would not willingly, nor would she, as my client, willingly submit to any questioning or examination by agents of the F.B.I. or by Thomas De Wolfe or John Hogan, Special Assistant Attorneys General, or by any other officers or agents of the Government, except under protest and under duress; that the attempt, since I was informed by Mr. R. C. Kopriva and Mr. William Simon of the F.B.I. that said persons chiefly were responsible therefor, was a deliberate violation of the Fourth, Fifth and Sixth Amendments of the U. S. Constitution and also a violation of legal ethics and of the rules of courtesy existing between adverse counsel not to subject another lawyer's client to the indignity of examination in an adversary proceeding without my knowledge or consent, and without a request and notice first being given and that they were duty bound to proceed in an orderly legal fashion and not violate the ethics of the legal pro-

fession which are binding upon attorneys whether they are governmental attorneys or not. My client, upon my instructions, thereupon stated to Mr. Kopriva that, upon my advice, she would decline to answer any questions.

Thereupon, Mr. Kopriva said he would talk to the agents interested, left the room and returned and said the agents, whose names he refused to reveal to me, wanted her taken into their office for five (5) minutes, that she would be taken there and that I could not accompany her. I stated she would not go willingly but only under duress and under protest and would decline to answer any questions that might be put to her. At my request Mrs. D'Aquino repeated this statement to him. Mrs. D'Aquino thereupon was taken by him into an office down the corridor leading from the reception room and about three minutes later was returned by him and requested to be seated in a chair next to me. She stated to me in his presence that she had been taken into a room where William Tillman and John Eldon Dunn, agents of the F.B.I., and a stenographer were present and that she informed them that, upon my advice as her counsel, she declined to answer any questions and, although they propounded questions to her, she declined to answer, upon my advice, and thereupon had been returned to the reception room.

Mr. Simon thereupon said to me that the F.B.I. was obeying its orders in the matter, i.e., the or-

ders of said John Hogan and Thomas De Wolfe, Special Assistant Attorneys General. I repeated my protests to him. I stated to him and Mr. Kopriva that those who were guilty of having ordered my client removed from County Jail No. 3 and brought to the F.B.I. office for questioning without judicial process having issued thereon and without notice to me were violations of my client's constitutional and statutory rights; that it was an executive interference with the judicial branch of government and a usurpation of judicial power; that it was a breach of legal ethics by the persons responsible for and participating therein, or for ordering said things to be done if they were attorneys, and a breach of the ordinary rules of courtesy to which adversary counsel is entitled and that all those guilty and responsible for this misconduct had engaged in vicious reprehensible conduct. I informed him and Mr. Kopriva that I would make an issue of the matter and that if there were any further attempts on the part of any officers, lawyers or agents of the Government that I would make an issue of each violation in open court.

Thereupon Mr. Dunn, Mr. Eagan, my client and I left the room and got into Mr. Dunn's car and were driven down town where I got out at Kearny and Bush Streets and my client thereafter was returned to County Jail No. 3.

Thereafter, upon reaching my office, 1701 Mills Tower, San Francisco, I telephoned Market 1-2500

and the operator connected me with the telephone of said Thomas De Wolfe. He answered my call and I repeated the aforesaid occurrence to him and asked him why my client had been seized and removed under his and Mr. Hogan's instructions, in manner as aforesaid, and at the outset he stated he did not wish to discuss the matter with adverse counsel on the telephone or to make any commitments in the matter unless he had a colleague with him, that he would not promise that such actions would not continue. Because of his reluctance to discuss the matter over the telephone I informed him that I would call upon him and Mr. Hogan Monday, September 27, 1948, and that I would make an issue out of this outrageous conduct.

I protest, condemn and censure that forced seizure and removal of my client from County Jail No. 3 as a prohibited violation of the Fourth Amendment of the U. S. Constitution. I protest, condemn and censure that forced seizure and removal from that jail to the office of the F.B.I. as a willful, deliberate, wrongful and unauthorized interference by the said executive officers and agents with the judicial power of the U. S. District Court for the Northern District of California, Southern Division, in the absence of judicial process having issued thereon for any such purpose; I protest, condemn and censure that unlawful seizure and removal of my client to the office of the F.B.I. by said agents and agencies for secret questioning by them, without advance and formal notice to me and without

judicial process having issued thereon, as a direct and deliberate violation of her constitutional right not to be compelled to act as a witness against herself on the purported charge brought against her and as a violation of her constitutional rights secured to her by the provisions of the Fifth Amendment of the U. S. Constitution. I protest, condemn and censure that unlawful seizure and removal for secret questioning as a violation of the code of legal ethics by which attorneys, even attorneys for the U. S. Government, as officers of the U. S. District Court, are bound, and as a deliberately wrongful and wholly unjustified interference with the privileged and confidential relationship of client and attorney existing between Mrs. D'Aquino and me, and also as a distinctly discourteous action upon the part of each and every officer and agent of the Government guilty of such reprehensible conduct.

I brand such misconduct as being of a nature and character we have always believed to be shunned in the United States. We are not willing to follow or adopt methods employed by Hitler's Gestapo and Stalin's Ogpu in the violation of civil liberty and constitutional right.

No opprobrium connected with this matter attaches to the U. S. Attorney's office in this judicial district. Neither the Hon. Frank J. Hennessy, U. S. Attorney, nor any of his Assistant U. S. Attorneys, nor any member of their staff would ever have been guilty of any such similar outrageous misconduct

nor would they or any of them have participated in this outrage.

/s/ WAYNE M. COLLINS,
Attorney for Iva Toguri
D'Aquino.

Copies to:

Hon. Frank J. Hennessy,
U. S. Attorney.

POINTS AND AUTHORITIES IN SUPPORT OF MOTION TO BE ADMITTED TO BAIL

1. Title 18 USCA, Section 597, as amended June 27, 1940, referring to bail in capital cases, provides as follows:

“Upon all arrests in criminal cases where the punishment may be death, bail shall be taken only by the Supreme Court or a district Court, or by a justice of the Supreme Court, a circuit judge, or a judge of a district court.”

2. Rule 46(a) of the Rules of Criminal Procedure for the District Courts of the United States, referring to the Right to Bail, provides in part, as follows:

“A person arrested for an offense punishable by death may be admitted to bail by any court or judge authorized by law to do so in the exercise of discretion, giving due weight to the evidence and to the nature and circumstances of the offense.”

3. Originally, bail in treason cases was not specifically provided for by statute but it was allowed by federal courts for special reasons in appropriate cases because admission to bail is an incident of the constitutional grant of judicial power and is an inherent right of that power. See *Hamilton v. U.S.*, 3 Dall. (3 U.S.) 17, 1 L. Ed. 490, decided in 1795 when the then existing statute (Act of April 30, 1790, 1 Stat. 112, Sec. 4) provided only the death penalty. The accused there, nevertheless, was admitted to bail.

And: *U.S. v. Jones* (1813) (CCPa) Fed. Case No. 15495, pg. 658, holding that one charged with piracy (a capital offense) who was suffering from the ravages of a disease which is injurious under confinement should be admitted to bail.

See also: *U.S. ex rel. Herbert v. Marshal* (1856), Fed. Case No. 15, 726a, where a defendant was indicted for murder and it was held that if it is clear to the court that a conviction for manslaughter might take place the accused should be admitted to bail.

Where a conviction is had for treason, the present rule is that the Court, in its discretion, may impose a minimum imprisonment of five years and a \$10,000 fine. See 18 USCA, Sec. 2.

In 1862, Congress enacted the Act of July 17, 1862, now 18 USCA, Sec. 2, which prescribes alternative punishments in treason cases and ever since then it has been the recognized rule that an accused

indicted on a charge of treason may be admitted to bail. The leading case first deciding this rule under the new statute is Case of Jefferson Davis (CCA Va.), (1867-1871), Fed. Case No. 3621a, at pages 78, 79, where bail was authorized.

4. In the great majority of the cases where defendants have been convicted of treason by our courts they have been sentenced to imprisonment. We find no cases where a death sentence, imposed by any of our courts, has been carried into execution. In each of the cases where death sentences were imposed by district courts and were not reversed by appellate courts, our Presidents have commuted the sentences or granted pardons. See *Cramer v. U.S.*, 325 U.S. 1, 24-25, 89, L. Ed. 1445, 1446, where Mr. Justice Jackson, delivering the Opinion of the Court states:

“In the century and a half of our national existence not one execution on a Federal treason conviction has taken place. Never before has this Court had occasion to review a conviction. In the few cases that have been prosecuted the treason clause has had its only judicial construction by individual Justices of this Court presiding at trials on circuit or by district or circuit judges. After constitutional requirements have been satisfied, and after juries have convicted and courts have sentenced, Presidents again and again have intervened to mitigate judicial severity or to pardon entirely.”

5. Inasmuch as the defendant, illegally and in violation of the principles and rules of international law, was seized by agents of the United States, acting under orders of the Attorney General, outside the jurisdiction of the United States in Tokyo, Japan, at the home and residence of the defendant and her husband on August 26, 1948, and thereafter forcibly was brought to San Francisco by agents of the United States, although defendant and her husband then were and ever since then have been and now are nationals and citizens of Portugal and were outside the jurisdiction of the United States and in Japan but within the exclusive jurisdiction of Portugal and entitled to the protection of the government of Portugal, she should be admitted to bail.

6. For the reason that the defendant has been unlawfully kidnapped, brought to this country, indicted and is indigent it is necessary for her constantly to consult with her attorney in the preparation of her defense and for her, jointly with her counsel, to interview in person many witnesses for her defense and whereas such interviews are impossible to conduct at County Jail No. 3 where defendant is confined and held incommunicado from all visitors except her father, sister and counsel, necessity and principles of international comity and justice require she should be admitted to reasonable bail for said purposes.

7. The Attorney General had neither constitutional nor statutory authority or jurisdiction to

seize the defendant in Japan and remove her therefrom to San Francisco, his authority and jurisdiction being limited to the continental United States and, in consequence, there was no jurisdiction to indict the defendant.

8. According to the law of the United States the defendant, accused by indictment herein, nevertheless, is presumed to be innocent of the charges therein preferred against her.

9. The foregoing demonstrate that the defendant has a substantial defense to the indictment on pure questions of law as well as on pure questions of fact and demonstrate the right to or the probability of a dismissal of the indictment or of an acquittal of the charges preferred against her.

For the said reasons we respectfully urge that the defendant be admitted to reasonable bail with such safeguards as to the Court shall seem sufficient.

Respectfully submitted,

/s/ WAYNE M. COLLINS,

Attorney for Defendant.

[Endorsed]: Filed October 13, 1948.

District Court of the United States, Northern District of California, Southern Division

At A Stated Term of the District Court of the United States for the Northern District of California, Southern Division, held at the Court Room

thereof, in the City and County of San Francisco, on Thursday, the 14th day of October, in the year of our Lord one thousand nine hundred and forty-eight.

Present: The Honorable Louis E. Goodman,
District Judge, sitting for and on behalf
of Honorable Michael J. Roche, District
Judge.

[Title of Cause.]

ORDER

(Minute order that defendant's motion for bail be denied and providing that marshal provide suitable place of confinement where defendant will have full opportunity to interview witnesses and consult with counsel.)

This case came on regularly this day for hearing of motion for bail of defendant, Iva Ikuko Toguri D'Aquino, who was present in the custody of the United States Marshal and with her attorney, Wayne Collins, Esq. Hon. Frank J. Hennessy, United States Attorney, and Tom De Wolfe, Esq., Special Assistant to the Attorney General, were present on behalf of the United States.

After hearing Mr. Collins and Mr. De Wolfe, it is Ordered that said motion that defendant be admitted to bail be denied. Further ordered that the United States Marshal provide suitable place of confinement where defendant shall have full opportunity to interview witnesses on her behalf and her attorney.

[Title of District Court and Cause.]

DEMAND FOR BILL OF PARTICULARS

Defendant demands a Bill of Particulars, failing which defendant will apply to the court for an order directing the plaintiff or the U. S. Attorney, attorney for plaintiff, to furnish defendant a Bill of Particulars, Acts, Facts and Things specified in the indictment in the above-entitled cause, as follows:

1. A statement of the particular place or places to which the word "elsewhere" on the last line of paragraph 2 on line 13 of page 2 of the indictment refers.

2. A statement of the particular place or places to which the word "elsewhere" in paragraph 3(a) on line 25 of page 2 of the indictment refers.

3. A statement of the particular place or places to which the word "elsewhere" in paragraph 3(b) on line 29 of page 2 of the indictment refers.

4. A statement of the respect or respects in which the Broadcasting Corporation of Japan was controlled by the Imperial Japanese Government, as alleged in paragraph 3(a) on page 2 of the indictment, or the meaning of that word as therein used.

5. A statement whether or not the alleged adherence of the defendant and the giving of aid and comfort to the enemies specified generally in paragraph 3 on pages 2 and 3 of the indictment actually

had the effect or result of aiding and comforting the enemies of the United States and, if so, in what respect or respects.

6. A statement of the precise or approximate time or times the defendant worked, announced and wrote radio script as alleged in paragraph 3(a) on page 2 of the indictment.

7. A statement of the nature, character and contents, in substance or effect, of the statements made by defendant as a radio speaker, radio announcer and broadcaster of recorded music alleged in paragraph 3(a) on page 2 of the indictment.

8. A statement of the nature, character and contents, in substance or effect, of the radio script prepared or composed by the defendant and of her talks and announcements and announcements of radio script alleged in paragraph 3(a) on page 2 of the indictment.

9. A statement of the nature and contents, in substance or effect, of the announcements and introductions made by the defendant of musical recordings and talks for broadcast by radio from Japan alleged in paragraph 3(a) on page 2 of the indictment.

10. A statement of the name of the "another person," mentioned in overt act No. 1 in paragraph 1 on page 3 of the indictment, with whom the defendant discussed the proposed participation of defendant in the radio broadcasting program therein mentioned.

11. A statement of the precise or approximate time when overt act No. 1, mentioned in paragraph 1 on page 3 of the indictment, took place together with a statement of the words spoken by each, in substance or effect, in the discussion therein mentioned and the nature of the discussion.

12. A statement of the precise or approximate time when overt act No. 2, mentioned in paragraph 2 on page 3 of the indictment, took place, together with the names of the employees of the Broadcasting Corporation of Japan with whom the defendant is alleged to have had the discussion therein alleged, together with a statement of the words spoken by each of them and defendant, in substance or effect.

13. A statement of the precise or approximate time when overt act No. 3, mentioned in paragraph 2 on page 4 of the indictment, took place, together with the words spoken by defendant into the microphone, in substance or effect, and the nature of the statements made.

14. A statement of the precise or approximate time when overt act No. 4, mentioned in paragraph 4 on page 4 of the indictment, took place, together with the words spoken by defendant, in substance or effect, into the microphone and also a statement, in substance or effect, of the precise reference alleged therein to have been made by her concerning enemies of Japan.

15. A statement of the precise or approximate

time when overt No. 5, mentioned in paragraph 5 on page 4 of the indictment, took place, together with the nature and contents, in substance and effect, of the script prepared for subsequent radio broadcast concerning the loss of ships, the ships to which it referred and the precise statement which was made concerning the loss of ships, either in substance or effect.

16. A statement of the precise or approximate time when overt act No. 6, mentioned in paragraph 6 on page 4 of the indictment, took place, together with the words which were spoken, in substance or effect, concerning the loss of ships, together with a statement of what ships the statement referred to.

17. A statement of the precise or approximate time when overt act No. 7, mentioned in paragraph 7 on page 4 of the indictment, took place, together with a statement of the nature and contents, in substance or effect, of the radio script therein alleged to have been prepared.

18. A statement of the precise or approximate time when overt act No. 8, mentioned in paragraph 8 on page 4 of the indictment, took place, together with the words, in substance or effect, which were spoken into the microphone and the names of each of the persons who engaged in the entertainment dialogue therein mentioned and the words spoken, in substance or effect, by any of the participants in the entertainment dialogue therein mentioned.

In case of your neglect or refusal so to furnish said particulars to said defendant, defendant will

apply to the court for an order directing compliance with this demand.

Dated: October 27, 1948.

/s/ WAYNE M. COLLINS,
Attorney for Defendant.

State of California,
City and County of San Francisco—ss.

Wayne M. Collins, being first duly sworn, deposes and says: that he is attorney of record for Iva Ikuko Toguri D'Aquino, defendant herein; that he has read the foregoing demand for bill of particulars and knows the contents thereof; that he verily believes the fact to be that the defendant cannot safely go to trial on the indictment herein without the details and particulars of the matters requested in the foregoing demand for a bill of particulars and that said details and particulars are essential and necessary to inform defendant of the nature of the accusation against her with sufficient precision to enable her to prepare for trial, to prevent being taken by surprise thereat and to permit her to plead the conclusion thereof in bar of another prosecution on the same charge.

/s/ WAYNE M. COLLINS.

Subscribed and sworn to before me this 27th day of October, 1948.

[Seal] /s/ JANE M. DOUGHERTY,
Notary Public in and for the City and County of
San Francisco, State of California.

Receipt of copy acknowledged.

[Endorsed]: Filed October 27, 1948.

[Title of District Court and Cause.]

DEMAND FOR DISCOVERY AND INSPECTION

Defendant demands the right to inspect and copy or photograph the hereinafter designated papers, documents or tangible objects, obtained from or belonging to the defendant or obtained from others by seizure or process, which said papers, documents or tangible objects, hereinafter specified, are material to the preparation of defendant's defense, viz:

(1) The statement, purporting to be made up, in part, of an oral statement of the defendant obtained from her and taken down in pencil by Sergeant Page (Paige?) of the Counter Intelligence Corps of the U. S. Eighth Army in Japan, acting under the orders of Brigadier General Richard Thorpe and Lt. Col. Turner of the said Corps and Army at the Yokohama New Grand Hotel, Yokohama, Japan, on or about September 6, 1945, which purports to set forth a narration of defendant's residence, employment, marriage to Philip (Felipe) J. D'Aquino, a national, citizen and domiciliary of Portugal residing in Japan, and her activities in Japan from July, 1941, to the date thereof, the defendant being at said time and place held under restraint by said army authorities.

(2) The picture or pictures of the defendant and General Eichelberger, U.S.A., taken at the order of said General at the Yokohama New Grand Hotel,

Yokohama, Japan, on or about September 6, 1945.

(3) The motion picture film and sound recording (sound film) synchronized therewith made of the defendant at Radio Tokyo, Tokyo, Japan, on or about October 1, 1945, on orders of the Signal Corps of the U. S. Eighth Army in Japan, and the radio script, consisting of several pages, then and there prepared for the same by a Second Lieutenant, U. S. Army, whose name was Cadeson or Kadeson or a name similarly pronounced, which defendant, by said person, was ordered to read into said sound film and thereafter at said time and place was ordered signed by defendant in her maiden name Iva I. Toguri and also, in quotes, "Tokyo Rose," together with several other pages of radio script then and there obtained by said person from the defendant.

(4) The typewritten, signed and witnessed statement, purporting to be made up, in part, of an oral statement obtained from the defendant and drawn up from pencil or ink notes made by a Mr. Hetrick who was in a U. S. Army uniform and either a member of the Counter Intelligence Corps of the U. S. Eighth Army in Japan, or attached thereto, or a member of the U. S. Department of Justice or a member of the U. S. Federal Bureau of Investigation, at Sugamo Prison in Tokyo, Japan, on or about December, 1945, the defendant then and there being held under restraint and imprisoned by U. S. authority which restraint and imprisonment commenced on October 17, 1945, and continued until

October 25, 1946, when defendant was released therefrom, together with the said notes, the said statement purporting to set forth a narration of defendant's residence, marriage to Philip (Felipe) J. D'Aquino, a national, citizen and *domiliary* of Portugal residing in Japan, and her employment and activities in Japan from July 1941, to the date thereof.

(5) The typewritten, signed and witnessed statement, purporting to be made up, in part, of an oral statement obtained from the defendant by and drawn up by Fred Tillman, special agent of the U. S. Federal Bureau of Investigation, from his notes, he then being in U. S. Army uniform and attached to the Counter Intelligence Corps or the U. S. Eighth Army in Japan, and thereafter signed by defendant at Sugamo Prison, Tokyo, Japan, on or about April, 1946, together with the original notes thereof, the defendant being held in restraint and imprisoned at said Sugamo Prison at said times by the United States, said statement purporting to narrate the history of defendant's residence, marriage and employment in Japan from July, 1941, to the date thereof.

(6) The photostat copy of notes purporting to be made by Clark Lee and purporting to be or to relate to an interview of the defendant by Harry Brundidge and Clark Lee, newspaper correspondents attached to the U. S. Eighth Army in Tokyo, Japan, purporting to have taken place on or about

September 2, 1945, at the Imperial Hotel in Tokyo, Japan, said photostat copy of notes being initialed "ID'A" on each page thereof and signed in defendant's name on or about March 26, 1948, at the building of General Headquarters of the United States Army, Tokyo, Japan, to which defendant forcibly was brought by agents of the United States from her home and sick bed in Tokyo, Japan, the said Harry Brundidge and one, John Hogan, a special assistant to the U. S. Attorney General, being present at said time and place, said photostat copy of notes purporting to relate to the history and activities of defendant in Japan from 1941 to the date thereof.

(7) The package of typewriter sized foolscap paper, consisting of a series or number of original and perhaps, a number of carbon copies, of typewritten pages or script, approximately one-half inch thick, obtained from the defendant by agents of the Counter Intelligence Corps of the U. S. Eighth Army in Japan, namely, Sergeant Page (Paige?) for Lt. Col. Turner at Yokohama, Japan, on or about September 15, 1945, said package of papers thereafter being in the possession of Fred Tillman, special agent of the U. S. Federal Bureau of Investigation, who, on or about April, 1946, at Sugamo Prison, Tokyo, Japan, obtained defendant's initialing of each page thereof while she was held in restraint and duress at said prison by United States authority, said papers in said package of

papers being in the nature of radio script purporting to have been prepared for broadcast from Radio Tokyo.

(8) Any and all phonographic tape, wire, electrical, magnetic, sound or other types of records, recordings or transcriptions made, manufactured, received or intercepted, and in the possession of or available to plaintiff, of any and all of the Zero Hour programs of Radio Tokyo or radio station JOAK on which the prosecution asserts or will assert at any trial herein that the defendant or person designated or known or referred to as "Orphan Ann," "Orphan Annie" or "Tokyo Rose" spoke, talked, recorded, announced or broadcasted any statement, matter or thing, together with any and all of the musical records or pieces or recordings thereof which the prosecution asserts or will assert at any trial herein that such person played, announced or broadcast thereon, covering the period of time from or about November 1, 1943, to and including August 15, 1945.

(9) Any and all recordings of the defendant's voice made on or about January 6, 1946, at Radio Tokyo, in Tokyo, Japan, obtained from the defendant by order of the Counter Intelligence Corps of the U. S. Eighth Army in Japan, which the prosecution asserts or will assert at any trial herein to be a recording of defendant's voice.

(10) Any and all recordings of the defendant's voice made on or about February, 1948, at Radio

Tokyo, in Tokyo, Japan, obtained from the defendant by order of the Counter Intelligence Corps of the U. S. Eighth Army in Japan, which the prosecution asserts or will assert at any trial herein to be a recording of defendant's voice.

(11) Several pages of handwritten script on typewriter sized foolscap paper, the contents purporting to be radio script, obtained from the defendant at Yokohama Prison, Yokohama, Japan, by Col. Robert Hardy, U.S.A., officer in charge of that prison, on or about October 17, 1945, which purports to be radio script prepared for broadcast.

(12) Any and all other papers, documents, records and things the United States or its agents obtained, if any, from the defendant, her husband or her home and residence situated at No. 396 Ikejiri Machi, Setagaya Ku, Tokyo, Japan, during the enforced absence therefrom of the defendant, which has or may have any bearing on any issues involved in this cause whether or not the plaintiff or its agents intend to use or offer any such evidence at any trial of the issues herein.

Inspection of each and all of the above-mentioned statements, documents and things, obtained from defendant as above stated, are or may be material to the preparation of defendant's defense to the indictment herein and are in the possession of or available to the plaintiff, or its agents, representatives and attorney.

/s/ WAYNE M. COLLINS,

Attorney for Defendant.

State of California,
City and County of San Francisco—ss.

Wayne M. Collins being first duly sworn deposes and says: that he is attorney of record for Iva Ikuko 'Toguri D'Aquino, defendant herein; that he has read the foregoing Demand for Discovery and Inspection and knows the contents thereof; that as such attorney he has investigated the facts concerning each of the twelve statements, documents and records mentioned therein; that he verily believes the facts to be true which therein are recited or narrated in said motion; that each of the items therein sought to be inspected, examined and copied or photographed are, for the reasons therein stated, material to the preparation of defendant's defense to the charges brought against her in the indictment in said cause and he verily believes that defendant's request and motion for discovery and inspection thereof is reasonable.

/s/ WAYNE M. COLLINS.

Subscribed and sworn to before me this 3rd day of November, 1948.

[Seal] /s/ JANE M. DOUGHERTY,
Notary Public in and for the City and County of
San Francisco, State of California.

Receipt of copy acknowledged.

[Endorsed]: Filed November 3, 1948.

[Title of District Court and Cause.]

DEMAND FOR ADDITIONAL
BILL OF PARTICULARS

Defendant demands an Additional Bill of Particulars, failing which defendant will apply to the court for an order directing the plaintiff or the U. S. Attorney, attorney for plaintiff, to furnish defendant an Additional Bill of Particulars, Acts, Facts and Things specified in the indictment in the above-entitled cause, as follows:

19. A statement of the times and places where defendant was arrested in Japan and confined to prison by agents of the United States, and thereafter released therefrom, the periods of time of said imprisonments, the authority and purpose for the said arrests and commitments to imprisonment and discharges therefrom, and a statement of the purpose for which and the authority under which defendant was arrested in Japan and brought to San Francisco in this Federal Judicial District shortly prior to the date of the return of the indictment herein, as alleged in the final paragraph on page 4 of the indictment, and also a statement whether or not each of her said arrests and imprisonments and releases therefrom, and her removal from Japan to San Francisco, and each of said things, were done with the consent and authority of the Allied Powers,

the government of Portugal, and the government of Japan or of any of said sovereign powers.

20. A statement whether the employment of defendant as a radio operator, radio announcer, radio script writer and broadcaster of recorded music, as alleged in paragraph 3(a) of the indictment, was or was not in a capacity for which only Japanese nationals were eligible.

21. A statement of the facts upon which are based the conclusions in the indictment, in paragraph 1 on page 1, paragraph 2 on page 2 and paragraph on top of page 4, that defendant is a citizen of the United States and a person owing allegiance to the United States.

22. A statement whether or not the defendant at Tokyo, Japan, was united in marriage to her now husband, Felipe J. D'Aquino, on April 19, 1945, who then was and ever since then has been and now is a national, citizen and domiciliary of Portugal residing in Japan.

23. A statement whether or not the United States heretofore, within the past three years, arrested defendant thrice or at all in Japan on the same accusation of treason as charged in the indictment herein and imprisoned her thrice and thereafter, acquitted her of the charges or convicted her thereon or sentenced or imprisoned her thereon and thereafter liberated her from such imprisonment at any time and, if so, when.

In case of your neglect or refusal so to furnish said particulars to said defendant, defendant will apply to the court for an order directing compliance with this demand.

Dated: November 3, 1948.

/s/ WAYNE M. COLLINS,
Attorney for Defendant.

State of California,
City and County of San Francisco—ss.

Wayne M. Collins, being first duly sworn, deposes and says: that he is attorney of record for Iva Ikuko Toguri D'Aquino, defendant herein; that he has read the foregoing demand for an additional bill of particulars and knows the contents thereof; that he verily believes the fact to be that the defendant cannot safely go to trial on the indictment herein without the details and particulars of the matters requested in the foregoing demand for an additional bill of particulars and that said details and particulars are essential and necessary to inform defendant of the nature of the accusation against her with sufficient precision to enable her to prepare for trial, to prevent being taken by surprise thereat and to permit her to plead the con-

clusion thereof in bar of another prosecution on the same charge.

/s/ WAYNE M. COLLINS.

Subscribed and sworn to before me this 3rd day of November, 1948.

[Seal] /s/ JANE M. DOUGHERTY,
Notary Public in and for the City and County of
San Francisco, State of California.

Receipt of copy acknowledged.

[Endorsed]: Filed November 3, 1948.

[Title of District Court and Cause.]

NOTICE OF MOTION TO STRIKE

To Hon. Frank J. Hennessy, U. S. Attorney, Attorney for Plaintiff.

You will please take notice that on Monday, November 22, 1948, at the hour of 10 o'clock a.m. of said day, or so soon thereafter as counsel can be heard, the defendant will bring on for hearing the within Motion to Strike upon the grounds and for the reasons set forth therein.

/s/ WAYNE M. COLLINS,
Attorney for Defendant.

Receipt of copy acknowledged.

[Title of District Court and Cause.]

MOTION TO STRIKE

The defendant moves the court for its order striking the whole of the indictment herein and, if the whole be not ordered stricken, she moves the court to strike the following matter therefrom, to wit:

1. The phrase “knowingly, wilfully, unlawfully, feloniously, intentionally, traitorously and treasonably” appearing in paragraph 2 on lines 5 and 6 of page 2 thereof, the same being conclusions of the pleader;

2. The phrase “and the officials and employees thereof” appearing in paragraph 2 on line 11 of page 2 thereof;

3. The words “within the United States, Japan and elsewhere” appearing in paragraph 2 on lines 12 and 13 of page 2 thereof;

4. The word “elsewhere” appearing in paragraph 3(a) on line 25 of page 2 thereof;

5. The word “elsewhere” appearing in paragraph 3(b) on line 29 of page 2 thereof;

6. The phrase “and their Allies in the Pacific Ocean area” appearing in paragraph 3(a) on lines 24 and 25 on page 2 thereof;

7. The words “and its Allies” in paragraph 3 on line 1 of page 3 thereof;

8. The words "and Allied" in paragraph 3 on line 1 of page 3 thereof;

9. The words "and Allied" appearing in paragraph 3 on line 2 of page 3 thereof;

10. The words "and Allied" appearing in paragraph 3 on line 4 of page 3 thereof;

11. The words "and Allied" appearing in paragraph 3 on lines 4 and 5 of page 3 thereof;

12. The phrase "knowingly, wilfully, unlawfully, feloniously, traitorously and treasonably" in paragraph 4 on lines 14 and 15 of page thereof;

13. The whole of paragraph 2 thereof;

14. The whole of paragraph 3, 3(a) and 3(b) thereof;

15. The whole of paragraph 4 thereof;

16. The whole of paragraph 4, including its subdivisions 1, 2, 3, 4, 5, 6, 7 and 8;

17. The whole of said indictment.

Said motion will be made on the indictment, this motion, notice hereof, and upon all the pleadings, papers, documents and files herein.

The said matter in said indictment and the said indictment will be sought to be stricken upon the grounds that said same are (1) sham, (2) irrelevant, (3) redundant, (4) immaterial, (5) superfluous, (6) repetitious, (7) unnecessary, (8) multifarious and (9) conclusions.

/s/ WAYNE M. COLLINS,

Attorney for Defendant.

POINTS AND AUTHORITIES IN SUPPORT
OF MOTION TO STRIKE

Under Art. III, Sec. 3, Cl. 1, treason consists only of levying war against the United States or in adhering to the enemies of the United States, giving them aid and comfort, and, in consequence, can be committed only against the United States.

Actions against Allies, that is to say, foreign sovereigns cannot constitute treason against the United States.

“Constructive” treason is not recognized by American law. See *Shortridge v. Macon*, 22 Fed. Cas. No. 12,812, and also *U.S. v. Burr*, 25 Fed. Cas. No. 14,692a.

In consequence, the reference to the Allies made in the indictment are irrevelant and surplusage.

Respectfully submitted,

/s/ WAYNE M. COLLINS,

Attorney for Defendant.

[Endorsed]: Filed November 15, 1948.

[Title of District Court and Cause.]

NOTICE OF MOTION TO DISMISS
INDICTMENT

To Hon. Frank J. Hennessy, U. S. Attorney, Attorney for Plaintiff.

You will please take notice that on Monday, No-

vember 22, 1948, at the hour of 10 o'clock a.m. of said day, or so soon thereafter as counsel can be heard, the defendant will move the above-entitled Court to dismiss the indictment herein upon the grounds and for the reasons set forth in the within Motion to Dismiss.

/s/ WAYNE M. COLLINS,
Attorney for Defendant.

[Title of District Court and Cause.]

MOTION TO DISMISS INDICTMENT

The defendant moves to quash and dismiss the indictment upon each and all of the following grounds and for the following reasons, to wit:

(1) The indictment fails to state facts sufficient to constitute an offense against the United States for failing to be a plain, concise and definite written statement of the offense charged, being vague, indefinite and uncertain in material respects in that the charges are so general that they do not inform the defendant of the acts of which she is accused with sufficient precision and description to enable her to prepare her defense thereto.

(2) Inasmuch as the indictment purports to plead treason in broad and general terms, that is to say, by pleading adherence to enemies through giving them aid and comfort, in paragraphs 2 and 3 of the indictment, without, however, specifying the

particulars of that adherence, aid and comfort and then, following those general allegations pleads special overt acts, in paragraph 4 thereof, which are vague, indefinite and uncertain on their face but are innocent and ineffective acts, as pleaded, and these special allegations limit and control the general allegations of treason, the indictment fails to state facts sufficient to constitute an offense against the United States.

(3) The court has no jurisdiction over the person of the defendant.

(4) The court has no jurisdiction over the person of the defendant because neither the Constitution nor Congress has authorized the seizure of the defendant at her residence in Japan or her removal therefrom to San Francisco.

(5) The court has no jurisdiction over the defendant because she was seized illegally at her residence in Japan by agents of the U. S. and brought to San Francisco in violation of the sovereignty of Portugal, of which country she is a national, citizen and domiciliary, and in violation of the sovereignty of Japan where she resides and hence also in contravention of principles of international law.

(6) The court has no jurisdiction over the offense alleged in the indictment which therein is stated to have taken place outside the jurisdiction of the United States on foreign soil by defendant as a resident of Japan.

(7) The court has no jurisdiction of the offense alleged in the indictment because the defendant was seized illegally at her residence in Japan and forcibly brought to San Francisco by agents of the United States without the authority and consent of the Government of Portugal and against the sovereignty of Portugal.

(8) The court has no jurisdiction of the offense alleged in the indictment because the defendant was seized illegally at her residence in Japan and forcibly brought to San Francisco by agents of the United States without the authority and consent of the Government of Japan and against the sovereignty of Japan.

(9) Neither this judicial district nor this court is the proper venue for the trial of the offense alleged in the indictment because neither the Constitution nor Congress has authorized any place whatever as the place of trial on treason charges alleged to have been committed in Japan by a Portuguese national or any other person residing within the geographical boundaries of Japan.

(10) The court has no jurisdiction of the offense alleged in the indictment because neither the Constitution nor Congress has authorized or designated any place whatever as the place of trial on treason charges alleged to have been committed in Japan by a Portuguese national or any other person residing within the geographical boundaries of Japan.

(11) The court has no jurisdiction of the offense alleged in the indictment because the United States has no extraterritorial jurisdiction extending over a Portuguese national or any other person residing within the geographical boundaries of Japan.

(12) The indictment is duplicitous for containing an improper joinder of several separate and distinct purported offenses which have not been separately stated.

(13) Neither the Attorney General nor the United States had constitutional or statutory authority or jurisdiction to seize the defendant at her place of residence in Japan and remove her therefrom to San Francisco; such authority and jurisdiction being limited to the continental United States and its possessions and in consequence, there was no jurisdiction lodged in the grand jury to indict the defendant and no jurisdiction exists in this court either over her or over the purported offense alleged in the indictment.

(14) Jurisdiction over the defendant is lodged in the War Department or the military commissions, tribunals or war courts set up by the U. S. and its Allies in Japan, to the exclusion of the Attorney General and this Court.

(15) Jurisdiction of the offense alleged in the indictment is lodged in the War Department or the military commissions, tribunals or war courts set up by the U. S. and its Allies in Japan, to the exclusion of the Attorney General and this Court.

(16) Jurisdiction over the defendant, if any exists, is lodged exclusively in the Government of Portugal.

(17) Jurisdiction over the offense, if any exists, is lodged exclusively in the Government of Portugal.

(18) Jurisdiction over the defendant, if any exists, is lodged exclusively in the Government of Japan.

(19) Jurisdiction over the offense, if any exists, is lodged exclusively in the Government of Japan.

(20) The indictment fails to state facts sufficient to constitute an offense against the United States.

(21) The indictment fails to state facts sufficient to constitute an offense against the United States for the reason that the defendant is a national, citizen and domiciliary of Portugal whose residence is in Japan.

(22) The indictment fails to state facts sufficient to constitute an offense against the United States for the reason that the defendant, by her marriage, in Japan, to a national, citizen and domiciliary of Portugal, resident in Japan, thereby lost her prior nationality, citizenship, domicile and residence and acquired the Portuguese nationality, citizenship and domicile of her husband and also his residence in Japan.

(23) The indictment fails to state facts sufficient to constitute an offense against the United States for the reason that the defendant's marriage on April 19, 1945, in Tokyo, Japan, to a national, citizen and domiciliary of Portugal, residing in Japan, constituted an act of expatriation and her naturalization as a Portuguese whereby she lost her prior nationality, citizenship, domicile and residence status and acquired and still has that of her husband.

(24) The court has no jurisdiction over the person of the defendant because she was seized illegally at her residence in Japan and forcibly brought to San Francisco by agents of the U. S. without the authority and consent of the Allied Powers in Japan having been obtained therefor.

(25) The court has no jurisdiction of the offense alleged in the indictment because the defendant was seized illegally in Japan and forcibly brought to San Francisco by agents of the U. S. without the authority and consent of the Allied Powers in Japan having been obtained therefor.

(26) The indictment fails to state facts sufficient to constitute an offense against the United States inasmuch as it alleges the employment of defendant as a radio speaker, radio announcer, radio script writer and broadcaster of recorded music, an occupation for which only Japanese nationals were eligible which, by operation of our law, constitutes an act of expatriation whereby she lost her

prior nationality and hence the court has neither jurisdiction over the defendant nor of the cause.

(27) The cause is barred by the limitation against prosecution, trial and punishment provisions of Title 18 USCA, Section 582, which provides that "No person shall be prosecuted, tried, or punished for any offense, not capital, except as provided in section 1046 (section 584 of this title), unless the indictment is found, or the information is instituted, within three years next after such offense shall have been committed," and by the provisions of Title 18 USCA, Sec. 3282, which set up a limitation against prosecution, trial and punishment for offenses not capital unless the indictment is found within three years next after such offense shall have been committed.

(28) The cause is barred by the limitation of prosecution, trial and punishment provisions of Title 18, USCA, Section 581, which provides that "No person shall be prosecuted, tried, or punished for treason or other capital offense, wilful murder excepted, unless the indictment is found within three years next after such treason or capital offense is done or committed," said statute not being repealed by the Act of Aug. 4, 1939, c. 419, sec. 1, 53 Stat. 1198, codified as Title 18 USCA, Secs. 581a and 581b, and Sec. 3281, effective Sept. 1, 1948, which authorize an indictment for any offense punishable by death to be found at any time without regard to any statute of limitations but, clearly, does not authorize either a prosecution, trial or punishment for treason committed three years before

indictment found, treason not necessarily being an offense punishable by death, those new sections merely authorizing a grand jury to return an indictment in such a case.

(29) The court has no jurisdiction over the person of the defendant inasmuch as it appears from the indictment itself that the alleged offense was committed outside the boundaries and jurisdiction of the United States and its possessions, to wit, in Japan by a resident of Japan.

(30) The court has no jurisdiction over the cause inasmuch as it appears from the indictment that the alleged offense was committed outside the boundaries and jurisdiction of the United States and its possessions, to wit, in Japan by a resident of Japan.

(31) The indictment fails to state facts sufficient to constitute an offense against the United States because it nowhere therein alleges that any acts, words or conduct of the defendant constituted a completed crime of treason.

(32) The indictment fails to state facts sufficient to constitute an offense against the United States for failing to be a plain, concise and definite written statement of the offense charged in that it is vague, indefinite and uncertain in material respects and, in consequence, fails to inform defendant of the nature of the accusation against her sufficient to enable her to present her defense thereto, in the following particulars, to wit:

(a) It does not allege any acts of treason by adherence to the enemies through giving them aid and comfort by specifying the particulars thereof and, inasmuch as the special overt acts pleaded in paragraph 4 of the indictment limit and control the general accusation, pleaded in paragraphs 2 and 3 thereof, and these special overt acts are innocent and ineffective on their face to sustain a charge of treason it cannot be ascertained therefrom what acts or conduct, if any, constitute the treason and are complained of;

(b) It is not alleged therein and it cannot be ascertained therefrom what particular place or places the word "elsewhere" on the last line of paragraph 2 on line 13 of page 2 of the indictment, the word "elsewhere" in paragraph 3(a) on line 25 of page 2 thereof and the word "elsewhere" in paragraph 3(b) on line 29 of page 2 thereof refers;

(c) It is not alleged therein and it cannot be ascertained therefrom what the word "controlled" in paragraph 3(a) on line 20 of page 2 of the indictment signifies or means in what mode and manner such control was exercised;

(d) It is not alleged therein and it cannot be ascertained therefrom what were the precise or approximate time or times the defendant worked, announced and wrote radio script, as alleged in paragraph 3(a) on page 2 of the indictment or what period of time such work, announcing and writing covered or the nature thereof;

(e) It is not alleged therein and it cannot be ascertained therefrom what were the nature, character and contents of the statements made by defendant as a radio speaker, radio announcer and broadcaster of recorded music alleged in paragraph 3(a) on page 2 of the indictment;

(f) It is not alleged therein and it cannot be ascertained therefrom what was the character and contents of the radio script prepared or composed by the defendant or of her talks and announcements, and announcements of radio script, alleged in paragraph 3(a) on page 2 of the indictment;

(g) It is not alleged therein and it cannot be ascertained therefrom what was the nature and contents of the announcements and introductions made by the defendant of the musical recordings and talks for broadcast by radio from Japan alleged in paragraph 3(a) of the indictment;

(h) It is not alleged therein and it cannot be ascertained therefrom what was or is the name of the "another person" mentioned in overt act No. 1 in paragraph 1 on page 3 of the indictment with whom the defendant discussed the proposed participation of defendant in the radio broadcasting program therein mentioned;

(i) It neither alleges nor can it be ascertained therefrom whether the employment of the defendant as a radio operator, radio announcer, script writer and broadcaster of recorded music alleged in paragraph 3(a) of the indictment was or was not in a capacity for which only Japanese nationals or subjects were eligible;

(j) It neither alleges nor can it be ascertained therefrom why or how the defendant whose name alone demonstrates her to be a foreigner married to a foreign national and brought here from Japan could be a citizen of this country;

(k) It neither alleges nor can it be ascertained therefrom why and under what authority the defendant was first brought, shortly prior to the date of the return of the indictment, into this federal judicial district, as alleged in the concluding paragraph of the indictment;

(l) It neither alleges, charges nor informs defendant of the precise times when each of the acts or conduct complained of took place;

(m) It neither alleges, charges nor informs defendant of any precise or specific acts, words or conduct of the defendant which constitute an offense against the United States;

(n) It doesn't charge that any offense was committed by the defendant within the United States, its territories, possessions or jurisdiction;

(o) It neither alleges nor can it be ascertained therefrom whether the acts or conduct therein mentioned actually had any treasonable effect or result upon any person or entity whatever;

(p) It doesn't allege and it cannot be ascertained therefrom whether the acts therein alleged to be overt acts, or any of them, had any treasonable effect or result upon any person or entity whomsoever;

(q) It does not allege and it cannot be ascer-

tained therefrom when the overt act alleged in paragraph 1 on page 3 thereof took place or the name of the other person who participated in the discussion therein mentioned or the words spoken, in substance or effect, nor the nature of the alleged discussion;

(r) It does not allege and it cannot be ascertained therefrom the time when the overt act alleged in paragraph 2 on page 3 thereof took place or the names of the employees with whom the alleged discussion was had or the words spoken, in substance or effect, or the nature of the alleged discussion;

(s) It does not allege and it cannot be ascertained therefrom the time when the overt act alleged in paragraph 3 on page 4 thereof took place or the words spoken into the microphone, in substance or effect, or the nature of the statements made;

(t) It does not allege and it cannot be ascertained therefrom the time when the overt act alleged in paragraph 4 on page 4 thereof took place or the words spoken, in substance or effect, into the microphone, or what was the precise reference made concerning enemies of Japan;

(u) It does not allege and it cannot be ascertained therefrom the time when the overt act alleged in paragraph 5 on page 4 thereof took place or what was the nature and contents, in substance or effect, of the script prepared for subsequent radio broadcast concerning the loss of ships or what ships it refers to;

(v) It does not allege and it cannot be ascertained therefrom the time when the overt act alleged in paragraph 6 on page 4 thereof took place or what words were spoken, in substance or effect, concerning the loss of ships or what ships it refers to;

(w) It does not allege and it cannot be ascertained therefrom the time when the overt act alleged in paragraph 7 on page 4 thereof took place or what was the nature and contents, in substance or effect, of the radio script therein alleged to have been prepared;

(x) It does not allege and it cannot be ascertained therefrom the time when the overt act alleged in paragraph 8 on page 4 thereof took place or what words, in substance or effect, were spoken into the microphone or the names of the persons who engaged in the entertainment dialogue therein mentioned or the substance and effect of the words spoken by any of them in the entertainment dialogue.

This motion will be made and based upon the indictment, notice of this motion, points and authorities in support thereof, affidavit annexed to the motion to admit defendant to bail, and all papers, records, documents and files herein and any evidence which may be adduced in support of this motion.

/s/ WAYNE M. COLLINS,
Attorney for Defendant.

(Copy)

Exhibit A

Warrant of Arrest

In the Name and Authority of

The Supreme Commander for the Allied Powers
To: The Provost Marshal, General Headquarters,
Far East Command, APO 500:

1. You are directed to arrest, and deliver forthwith to the Sugamo Prison, the following described person:

- a) Ikuko (Iva) Toguri D'Aquino
- b) Residing at 396 Ikijiri-machi, Setagaya-ku, Tokyo, Japan
- c) Age 32 years.

2. Upon complaint and sufficient information made to me by the Department of Justice, United States Government, as contained in Radio WCL 20431, from the Adjutant General, Department of the Army, dated 25 August, 1948, the person described in paragraph 1 above is suspected of having committed the following crime:

Treasonable conduct against the United States Government during World War II.

3. You will make known to the person arrested, in her native language, the contents of this document.

4. Authority to arrest under this warrant expires 30 days from date herein.

Place: Tokyo, Japan.

Date: 26 August, 1948.

W. A. BEIDERLINDEN,

Brigadier General, United States Army, Assistant
Chief of Staff, G-1, General Headquarters, Far
East Command, APO 500.

(Copy)

Portuguese Consulate

Tokyo

To whom it may concern,

This is to certify that, Mr. Filipe Jairus
D'Aquino, born in Yokohama on 26th March, 1921,
married to Mrs. Ikuko Toguri d'Aquino, is a Por-
tuguese national duly registered in this Consulate.

Portuguese Consulate in Tokyo, 4th November,
1948.

/s/ J. A. ABRANCHES PINTO,
J. A. ABRANCHES PINTO.

(Rubber Stamp) Consulado De Portugal Toquio.

(Rubber Stamp) Pagou ao cambio de 11.00 a
quantia de Y275.00 (Es. 25\$00) segundo o numero
26° da tabela, ficando esta importancia lancada no
livro de receita sob o Numero 259.

Toquio, 4 de Novembro, 1948.

/s/ A. PINTO.

(Stamp) Republica Portuguesa 25\$00 Servico
Consular.

(Rubber Stamp) Consulado De Portugal Toquio.

(Translation)

(Rubber Stamp): Consulate of Portugal, Tokyo.

(Coat of Arms)

Consulate of Portugal

Tokyo

Service of the Portuguese Republic

Certificate of Consular Registry No. 190

The Consul of the Portuguese Republic in Tokyo makes it known that Filipe Jairus d'Aquino, marital status, married, profession, newspaperman, son of Jose Filomeno d'Aquino and Maria d'Aquino, born on the 26th day of March, 1921, a native of Yokohama is a Portuguese citizen and is duly registered in the Register of this Consulate under No. 5 of Book No. 1 of inscriptions.

His last residence was Yokohama and he arrived on (date in blank) at this consular district.

He resides in Tokyo, Setagaya-ku, 396 Ikejirimachi.

He proved his identity by previous consular certificate.

Consulate of Portugal in Tokyo, on June 30, 1947.

(Rubber Stamp): Consulate of Portugal, Tokyo

(Photograph)

(Rubber Stamp): Consulate of Portugal, Tokyo

Characteristics: Height, Hair, Face, Beard, Eyes, Nose, Mouth, Color—Blank.

Signature of the person being registered

/s/ FILIPE J. d'AQUINO,

/s/ J. A. ABRANCHES PINTO,

Consul.

(Rubber Stamp): J. A. Abranches Pinto, Consul

This certificate is valid for the period of one year.

Paid at the rate of 0.80 the amount of Y9.60 in accordance with Item 1 of the table of rates, this amount being entered in the book of entries under No. 1753.

Tokyo, June 30, 1947.

/s/ A. PINTO.

(Rubber Stamp): Consulate of Portugal, Tokyo

(Stamp): Portuguese Republic 12\$00 Consular Service.

(Rubber Stamp): Consulate of Portugal, Tokyo

(On the back of the certificate: Rubber stamp with Oriental characters)

(Translation)

(Rubber stamp): Consulate of Portugal, Tokyo.

Consulate of Portugal

(Coat of Arms)

Tokyo

Service of the Portuguese Republic

Certificate of Consular Registry No. 159

The Consul of the Portuguese Republic in Tokyo makes it known that Ikuko Toguri d'Aquino (by

marriage to Filipe J. d'Aquino), marital status, married, profession, newspaperwoman, daughter of Jun Toguri and Fumi Toguri, born on July 4, 1918, a native of Los Angeles, California is a Portuguese citizen and is duly registered in the Register of this Consulate under No. 5 of Book No. 1 of inscriptions.

Her last residence was in (blank) and she arrived in (date blank) at this consular district.

She resides in Setagaya-ku, Ikejirimachi, No. 396.

She proved her identity by previous consular certificate.

Consulate of Portugal in Tokyo, on September 10, 1946.

(Rubber Stamp): Consulate of Portugal, Tokyo

(Photograph)

(Rubber Stamp): Consulate of Portugal, Tokyo

Characteristics: Height, Hair, Face, Beard, Eyes, Nose, Mouth, Color—Blank.

Signature of the person being registered

/s/ IKUKO TOGURI d'AQUINO,

/s/ J. A. ABRANCHES PINTO,

Consul.

This certificate is valid for the period of one year.

Paid at the rate of 0.20 the amount of Y2.40 in accordance with Item No. 1 of the table of rates,

this amount being entered in the book of entries under No. 1694.

Tokyo, September 10, 1946.

/s/ A. PINTO.

(Stamp): Portuguese Republic 12\$00 Consular Service.

(Rubber Stamp): Consulate of Portugal, Tokyo

(On the back of the certificate: Rubber stamp with Oriental characters)

(Translation)

Consulate of Portugal

Tokyo

Affidavit

I, Joao do Amaral Abranches Pinto, Consul of Portugal in Tokyo, upon request and because it is the truth and to whom it may concern, do hereby certify that, the books and documents belonging to the files of the Consulate of Portugal in Yokohama having been destroyed on the occasion of the earthquake and subsequent fire of September 1, in the year 1923, it is not possible to furnish the record of birth certificate of Filipe Jairus d'Aquino, married, born in Yokohama on March 26, 1921, son of Jose Filomeno d'Aquino and Maria d'Aquino.

Consulate of Portugal in Tokyo, November 4, 1948.

(Rubber Stamp): Consulate of Portugal, Tokyo

The Consul,

/s/ J. A. ABRANCHES PINTO,

J. A. ABRANCHES PINTO,

(Rubber stamp): Paid at the rate of 11.00 the amount of Y275.00 (Escudos 25\$00) in accordance with item 26 of the table of rates, this amount being entered in the book of entries under No. 257.

Tokyo, November 4, 1948.

/s/ A. PINTO.

(Stamp): Portuguese Republic 25\$00 Consular Service

(Rubber Stamp): Consulate of Portugal, Tokyo

(Translation)

Consulate of Portugal

Tokyo

(Consular Seal over wax)

/s/ A. PINTO.

I, Joao do Amaral Abranches Pinto, Consul of Portugal in Tokyo, Japan:

Do hereby certify that in the book of records and transcriptions of marriages of this Consulate of Portugal in Tokyo, on the back of page seven, page eight and back, there appears the record of marriage as follows:

Record No. 5—At the request of Filipe Jairus Testus d'Aquino, I, Joao do Amaral Abranches Pinto, Consul of Portugal in Tokyo, transcribe hereunder the following record of marriage, performed in conformity with the canonic laws of the Catholic Chapel annexed to Sophia University of Tokyo, in Kojimachi-ku, Tokyo, on the nineteenth day of the month of April, in the year nineteen hundred and forty-five, before the Reverend Father J. B. Kraus, S.J.

On the nineteenth day of the month of April in the year nineteen hundred and forty-five, in the chapel annexed to the Catholic Sophia University of Tokyo, in Kojimachi-ku, Tokyo, before the Reverend Father J. B. Kraus, S.J., the following performed their marriage: the bridegroom Filipe Jairus Testus d'Aquino, newspaperman, residing in this capital, single, a native of Yokohama, Japan, born on the twenty-sixth day of March, in the year nineteen hundred and twenty-one, legitimate son of Jose Filomeno d'Aquino and Maria d'Aquino, and the bride: Ikuko Toguri, residing in this capital, single, North-American citizen, a native of Los Angeles, California, United States of North America, born on the fourth day of July, in the year nineteen hundred and eighteen, legitimate daughter of Jun Toguri and Fumi Toguri, her name becoming Ikuko Toguri d'Aquino.

And for the records, I transcribe this marriage record in accordance with the terms of Article 36 of Decree Number 29970, published in the Govern-

ment Diary Number 240 of October 13, of the year 1939, and in the Portuguese Civil Code, on presentation of the proofs, which are annexed to this record at the request of the bridegroom. Consulate of Portugal in Tokyo, on the eighteenth day of the Month of June, in the year nineteen hundred and forty-five. Signature: J. A. Abranches Pinto, Consul. There follows the receipt of consular emoluments. Paid at the rate of exchange of 0.20 the amount of Forty Escudos (y 8.00) in accordance with item 20 of the table of rates, this amount being entered into the book of entries under No. 1620. Tokyo, June 18, 1945. Signed, A. Pinto. Fiscal stamp of the Consular Service duly authenticated by a rubber stamp reading:

Consulate of Portugal, Tokyo.

Nothing else appearing in the record that I am consulting, I issued these presents, to which is affixed a stamp of this Consulate, signed by me on the fourth day of the month of November, in the year nineteen hundred and forty-eight.

Consulate of Portugal in Tokyo, on November 4, 1948.

/s/ J. A. ABRANCHES PINTO,
J. A. ABRANCHES PINTO,
Consul.

(Rubber Stamp): Consulate of Portugal, Tokyo

(Stamp): Portuguese Republic, 40\$00, Consular Service)

(Rubber stamp): Consulate of Portugal, Tokyo

(Rubber stamp): Paid at the rate of 11.00 the amount of Y440.00 (Escudos 40\$00) in accordance with item 25 of the table of rates, this amount being entered in the book of entries under number 258.

Tokyo, November 4, 1948.

/s/ A. PINTO.

AFFIDAVIT

State of California,
City and County of San Francisco—ss.

Manuel Reis, being by me first duly sworn, deposes and says: That he is a resident of the City and County of San Francisco, State of California; that he understands, reads and writes both the Portuguese and the English languages, and is able to translate writings from one into the other of said languages; that he has translated the following documents, to wit:

(a) Consular certificate of Filipe Jairus d'Aquino;

(b) Consular certificate of Ikuko Toguri d'Aquino;

(c) Affidavit signed by the Consul of Portugal in Tokyo;

(d) Marriage certificate of Filipe Jairus Testus d'Aquino and Ikuko Toguri;

which documents are written in Portuguese; and that the annexed is a true, complete and correct

translation into English of the said foregoing attached documents in Portuguese, to the best of his knowledge and ability.

/s/ MANUEL REIS.

Subscribed and sworn to before me, this 9 of December, A.D. 1948.

[Seal]: /s/ H. M. ELISSAMBURU,
Notary Public.

My Commission expires Nov. 21, 1951.

[Note]: Translations only. Documents in Portuguese not printed.

[Endorsed]: Filed Nov. 15, 1948.

[Title of District Court and Cause.]

NOTICE OF MOTION FOR DISCOVERY
AND INSPECTION

To Hon. Frank J. Hennessy, U. S. Attorney, Attorney for Plaintiff:

You will please take notice that on Monday, November , 1948, at the hour of 10 o'clock a.m. of said day, or so soon thereafter as counsel can be heard, the defendant will move the above-entitled Court for an order requiring the plaintiff to permit defendant to inspect and examine the statements, documents, records and things specified in the within Motion for Discovery and Inspection.

/s/ WAYNE M. COLLINS,
Attorney for Defendant.

[Title of District Court and Cause.]

MOTION FOR DISCOVERY
AND INSPECTION

The defendant Iva Ikuko Toguri D'Aquino, by her attorney, moves the Court for an order requiring the United States of America, plaintiff, or the attorney for plaintiff, to permit defendant to inspect and copy or photograph the following designated papers, documents or tangible objects, obtained from others by seizure or process, which said papers, documents or tangible objects, hereinafter specified, are material to the preparation of defendant's defense, said discovery and inspection to be at a time, place and in such manner and under such terms and conditions as are just, to-wit:

(1) The statement, purporting to be made up, in part, of an oral statement of the defendant obtained from her and taken down in pencil by Sergeant Page (Paige?) of the Counter Intelligence Corps of the U. S. Eighth Army in Japan, acting under the orders of Brigadier General Richard Thorpe and Lt. Col. Turner of the said Corps and Army at the Yokohama New Grand Hotel, Yokohama, Japan, on or about September 6, 1945, which purports to set forth a narration of defendant's residence, employment, marriage to Philip (Felipe) J. D'Aquino, a national, citizen and domiciliary of Portugal residing in Japan, and her activities in Japan from

July, 1941, to the date thereof, the defendant being at said time and place held under restraint by said Army authorities.

(2) The picture or pictures of the defendant and General Eichelberger, U.S.A., taken at the order of said General at the Yokohama New Grand Hotel, Yokohama, Japan, on or about September 6, 1945.

(3) The motion picture film and sound recording (sound film) synchronized therewith made of the defendants at Radio Tokyo, Tokyo, Japan, on or about October 1, 1945, on orders of the Signal Corps of the U. S. Eighth Army in Japan, and the radio script, consisting of several pages, then and there prepared for the same by a Second Lieutenant, U. S. Army, whose name was Cadeson or Kadeson or a name similarly pronounced, which defendant, by said person, was ordered to read into said sound film and thereafter at said time and place was ordered signed by defendant in her maiden name Iva I. Toguri and also, in quotes, "Tokyo Rose," together with several other pages of radio script then and there obtained by said person from the defendant.

(4) The typewritten, signed and witnessed statement, purporting to be made up, in part, of an oral statement obtained from the defendant and drawn up from pencil or ink notes made by a Mr. Hetrick who was in a U. S. Army uniform and either a member of the Counter Intelligence Corps of the U. S. Eighth Army in Japan, or attached thereto,

or a member of the U. S. Department of Justice or a member of the U. S. Federal Bureau of Investigation, at Sugamo Prison in Tokyo, Japan, on or about December, 1945, the defendant then and there being held under restraint and imprisoned by U. S. authority which restraint and imprisonment commenced on October 17, 1945, and continued until October 25, 1946, when defendant was released therefrom, together with the said notes, the said statement purporting to set forth a narration of defendant's residence, marriage to Philip (Felipe) J. D'Aquino, a national, citizen and domiciliary of Portugal residing in Japan, and her employment and activities in Japan from July 1941, to the date thereof.

(5) The typewritten, signed and witnessed statement, purporting to be made up, in part, of an oral statement obtained from the defendant by and drawn up by Fred Tillman, special agent of the U. S. Federal Bureau of Investigation, from his notes, he then being in U. S. Army uniform and attached to the Counter Intelligence Corps or the U. S. Eighth Army in Japan, and thereafter signed by defendant at Sugamo Prison, Tokyo, Japan, on or about April, 1946, together with the original notes thereof, the defendant being held in restraint and imprisoned at said Sugamo Prison at said times by the United States, said statement purporting to narrate the history of defendant's residence, marriage and employment in Japan from July, 1941, to the date thereof.

(6) The photostat copy of notes purporting to be made by Clark Lee and purporting to be or to relate to an interview of the defendant by Harry Brundidge and Clark Lee, newspaper correspondents attached to the U. S. Eighth Army in Tokyo, Japan, purporting to have taken place on or about September 2, 1945, at the Imperial Hotel in Tokyo, Japan, said photostat copy of notes being initialed "ID'A" on each page thereof and signed in defendant's name on or about March 26, 1948, at the building of General Headquarters of the United States Army, Tokyo, Japan, to which defendant forcibly was brought by agents of the United States from her home and sick bed in Tokyo, Japan, the said Harry Brundidge and one, John Hogan, a special assistant to the U. S. Attorney General, being present at said time and place, said photostat copy of notes purporting to relate to the history and activities of defendant in Japan from 1941 to the date thereof.

(7) The package of typewriter sized foolscap paper, consisting of a series or number of original and perhaps, a number of carbon copies, of typewritten pages or script, approximately one-half inch thick, obtained from the defendant by agents of the Counter Intelligence Corps of the U. S. Eighth Army in Japan, namely, Sergeant Page (Paige?) for Lt. Col. Turner at Yokohama, Japan, on or about September 15, 1945, said package of papers thereafter being in the possession of Fred Tillman,

special agent of the U. S. Federal Bureau of Investigation, who, on or about April, 1946, at Sugamo Prison, Tokyo, Japan, obtained defendant's initialing of each page thereof while she was held in restraint and duress at said prison by United States authority, said papers in said package of papers being in the nature of radio script purporting to have been prepared for broadcast from Radio Tokyo.

(8) Any and all phonographic tape, wire, electrical, magnetic, sound or other types of records, recordings or transcriptions made, manufactured, received or intercepted, and in the possession of or available to plaintiff, of any and all of the Zero Hour programs of Radio Tokyo or radio station JOAK on which the prosecution asserts or will assert at any trial herein that the defendant or person designated or known or referred to as "Orphan Ann," "Orphan Annie" or "Tokyo Rose" spoke, talked, recorded, announced or broadcasted any statement, matter or thing, together with any and all of the musical records or pieces or recordings thereof which the prosecution asserts or will assert at any trial herein that such person played, announced or broadcast thereon, covering the period of time from or about November 1, 1943, to and including August 15, 1945.

(9) Any and all recordings of the defendant's voice made on or about January 6, 1946, at Radio Tokyo, in Tokyo, Japan, obtained from the defendant by order of the Counter Intelligence Corps of

the U. S. Eighth Army in Japan, which the prosecution asserts or will assert at any trial herein to be a recording of defendant's voice.

(10) Any and all recordings of the defendant's voice made on or about February, 1948, at Radio Tokyo, in Tokyo, Japan, obtained from the defendant by order of the Counter Intelligence Corps of the U. S. Eighth Army in Japan, which the prosecution asserts or will assert at any trial herein to be a recording of defendant's voice.

(11) Several pages of handwritten script on typewriter sized foolscap paper, the contents purporting to be radio script, obtained from the defendant at Yokohama Prison, Yokohama, Japan, by Col. Robert Hardy, U.S.A., officer in charge of that prison, on or about October 17, 1945, which purports to be radio script prepared for broadcast.

(12) Any and all other papers, documents, records and things the United States or its agents obtained, if any, from the defendant, her husband or her home and residence situated at No. 396 Ikejiri Machi, Setagaya Ku, Tokyo, Japan during the enforced absence therefrom of the defendant, which has or may have any bearing on any issues involved in this cause whether or not the plaintiff or its agents intend to use or offer any such evidence at any trial of the issues herein.

Inspection of each and all of the above-mentioned statements, documents and things, obtained from defendant as above stated, are or may be material to

the preparation of defendant's defense to the indictment herein and are in the possession of or available to the plaintiff, or its agents, representatives and attorney.

/s/ WAYNE M. COLLINS,
Attorney for Defendant.

State of California,
City and County of San Francisco—ss.

Wayne M. Collins being first duly sworn deposes and says: that he is attorney of record for Iva Ikuko Toguri D'Aquino, defendant herein; that he has read the foregoing Motion for Discovery and Inspection and knows the contents thereof; that as such attorney he has investigated the facts concerning each of the twelve statements, documents and records mentioned therein; that he verily believes the facts to be true which therein are recited or narrated in said motion; that each of the items therein sought to be inspected, examined and copied or photographed are, for the reasons therein stated, material to the preparation of defendant's defense to the charges brought against her in the indictment in said cause and he verily believes that defendant's request and motion for discovery and inspection thereof is reasonable.

/s/ WAYNE M. COLLINS.

Subscribed and sworn to before me this 15th day of November, 1948.

[Seal] /s/ JANE M. DOUGHERTY,
Notary Public in and for the City and County of
San Francisco, State of California.

Points and Authorities in Support of Motion
for Discovery and Inspection

The motion for discovery and inspection of the statements, documents and things set forth in said motion is authorized specifically by the new rule of criminal procedure, Rule 16 of the Rules of Criminal Procedure for the District Courts of the United States in 1946.

See also, U.S. v. B. Goedde & Co., 40 Fed. Sup. 523, 534, decided in 1941 and so authorizing before the new rule became effective.

Respectfully submitted,
/s/ WAYNE M. COLLINS,
Attorney for Defendant.

Receipt of copy acknowledged.

[Endorsed]: Filed November 15, 1948.

[Title of District Court and Cause.]

NOTICE OF MOTION TO DISMISS INDICT-
MENT ON DEFENSES AND OBJECTIONS
CAPABLE OF DETERMINATION WITH-
OUT TRIAL OF GENERAL ISSUE

To Hon. Frank J. Hennessy, U. S. Attorney, At-
torney for Plaintiff:

You will please take notice that on Monday, No-
vember , 1948, at the hour of 10 o'clock a.m. of
said day, or so soon thereafter as counsel can be

heard, the defendant will move the above-entitled Court to dismiss the indictment herein upon the grounds and for the reasons set forth in the within Motion to Dismiss Indictment on Defenses and Objections Capable of Determination Without Trial of General Issue.

/s/ WAYNE M. COLLINS,
Attorney for Defendant.

[Title of District Court and Cause.]

MOTION TO DISMISS INDICTMENT ON DEFENSES AND OBJECTIONS CAPABLE OF DETERMINATION WITHOUT TRIAL OF GENERAL ISSUE UNDER RULE 12, RULES OF CRIMINAL PROCEDURE

The defendant moves the court to quash and dismiss the indictment upon a determination of each and all of the following defenses and objections to the indictment which are capable of determination without a trial of the general issue, upon each and all of the following grounds and for the following reasons, to-wit:

(1) The cause is barred by the provisions of the 5th Amendment by reason of the prior acquittal of the defendant by the United States on or about September 6, 1945, on the same charges contained in the indictment herein which were preferred against her by the United States, in Japan, on or about September 5, 1945.

(2) The cause is barred by the provisions of the 5th Amendment by reason of the prior acquittal of the defendant by the United States on or about October 25, 1946, on the same charges contained in the indictment herein which were preferred against her by the United States, in Japan, on or about October 17, 1945.

(3) The cause is barred by the provisions of the 5th Amendment against subjecting the defendant to double jeopardy of life or limb for the same offense by reason of the fact that the defendant previous to the time this indictment was returned herein, to wit, on September 5, 1945, was put in jeopardy by the United States for the same offense alleged in the indictment herein.

(4) The cause is barred by the provisions of the 5th Amendment against subjecting the defendant to double jeopardy of life or limb for the same offense by reason of the fact that the defendant previous to the time this indictment was returned herein, to wit, on October 17, 1945, and thereafter unto October 25, 1946, was put in jeopardy by the United States for the same offense alleged in the indictment herein.

(5) The cause is barred by the provisions of the 5th Amendment by reason of the prior conviction of the defendant, without trial, on or about October 17, 1945, by the United States on the same charges contained in the indictment herein which were preferred against her by the United States, in Japan.

on or about said October 17, 1945, followed by her sentence, commitment to and imprisonment, by the United States, in the Yokohama Prison, Yokohama, Japan, on said date and transfer therefrom on November 16, 1945, to the Sugamo Prison, Tokyo, Japan, by the United States, her jailer, and her final release and discharge therefrom by the United States on October 25, 1946.

(6) The cause is barred by reason of the fact that the issues of fact and of law involved herein are res judicata because the defendant heretofore, on or about September 6, 1945, was acquitted by the United States in Japan of the identical charges herein which there were brought against her on September 5, 1945, by the United States.

(7) The cause is barred by reason of the fact that the issues of fact and of law involved herein are res judicata because the defendant heretofore, on or about October 25, 1946, was acquitted by the United States in Japan of the identical charges herein which there were brought against her on October 17, 1945, by the United States.

(8) The cause is barred by reason of the fact that the issues of fact and of law involved herein are res judicata because the defendant heretofore, on or about September 5, 1945, was convicted by the United States in Japan of the identical charges herein which there were brought against her on that date by the United States.

(9) The cause is barred by reason of the fact that the issues of fact and of law involved herein are *res judicata* because the defendant theretofore, on or about October 25, 1946, was convicted by the United States in Japan of the identical charges herein which there were brought against her on October 17, 1945, by the United States which thereupon imprisoned her thereon for one year, one week and one day until October 25, 1946, in Japan and thereupon discharged her from imprisonment.

(10) The cause is barred by the fact that the United States, in violation of the guaranty of the 6th Amendment, safeguarded by the due process clause of the 5th Amendment, long has deprived the defendant of a "speedy," public, fair and impartial trial, of being informed of the nature and cause of any accusation against her, of being confronted with any witnesses against her, of having compulsory or any process for obtaining witnesses in her favor and of the assistance of counsel for her defense by reason of the facts that the defendant, on or about October 17, 1945, was accused and charged by the United States, in Japan, of the commission of the same offense and charges contained in the indictment herein and, thereafter, on said October 17, 1945, thereon was sentenced and committed to and imprisoned by the United States in the Yokohama Prison, Yokohama, Japan, from that date until November 16, 1945, when she was transferred to the Sugamo Prison, Tokyo, Japan, where she continu-

ously was imprisoned by her jailor, the United States, until October 25, 1946, when she was released and discharged from custody by the United States and, thereafter, on August 26, 1948, the defendant again was re-arrested at her home in Tokyo, Japan, by the United States and ever since then continuously has been imprisoned by the United States and, on September 25, 1948, forcibly was brought to San Francisco, in custody, from Japan by the United States and ever since then has been and now is imprisoned by the United States, all of which has operated to deprive and has deprived defendant of said constitutional guarantees and has operated to deprive and has deprived and caused this court to lose jurisdiction over the cause and over the person of the defendant.

(11) The cause is barred by virtue of the fact that the defendant is not a citizen or subject of the United States but is and ever since on or about April 19, 1945, has been a national, citizen and domiciliary of Portugal and lawfully a permanent resident of Japan by virtue of her marriage to Felipe (Philip) J. D'Aquino, an adult national, citizen and domiciliary of Portugal who then and ever since then has been and now is a lawful and permanent resident of Tokyo, Japan, and, in consequence, the court has neither lawful jurisdiction over the person of the defendant nor over the cause.

(12) The cause is barred by the fact that, if the defendant at any time was a national and citizen of the United States, her employment, as alleged in

the indictment, from on or about November 1, 1943, to and including August 13, 1943, by the Broadcasting Corporation of Japan, therein alleged to have been a company controlled by the Imperial Japanese Government, in the position therein referred to, in and of itself, constituted an act of expatriation and operated to cause her to lose her said United States nationality and citizenship and to become an expatriate in Japan and, in consequence, a person outside the lawful jurisdiction of the United States and of this court and not subject to the jurisdiction of the United States and of this court.

(13) Neither this judicial district nor this court is the proper venue for the return of the indictment herein.

(14) Neither this judicial district nor this court is the proper venue for the trial of the cause.

(15) The court has no jurisdiction over the person of the defendant and could not acquire any such jurisdiction by virtue of the fact that she is a national and citizen of Portugal, domiciled in Portugal, and a lawful and permanent resident of Tokyo, Japan, who was kidnapped unlawfully in Japan by the United States and forcibly brought to San Francisco by the United States.

(16) The court has no jurisdiction over the cause and could not acquire any such jurisdiction by virtue of the fact that she is a national and citizen of Por-

tugal, domiciled in Portugal, and a lawful and permanent resident of Tokyo, Japan, who unlawfully was seized in Japan by the United States and forcibly brought to San Francisco by the United States.

(17) The jurisdiction over the person of the defendant is lodged in the Government of Portugal to the exclusion of the United States and this court.

(18) The jurisdiction over the cause, if any exists, is lodged in the Government of Portugal to the exclusion of the United States and this court.

(19) Jurisdiction over the defendant is lodged in the War Department or the military commissions, tribunals or war courts set up by the U. S. and its Allies in Japan, to the exclusion of the Attorney General and this court.

(20) Jurisdiction of the offense alleged in the indictment is lodged in the War Department or the military commissions, tribunals or war courts set up by the United States and its Allies in Japan, to the exclusion of the Attorney General and this court.

(21) The jurisdiction over the person of the defendant is lodged in the Government of Japan to the exclusion of the United States and this court.

(22) The jurisdiction over the cause, if any exists, is lodged in the Government of Japan to the exclusion of the United States and this court.

(23) Neither the United States nor this court has jurisdiction over the person of the defendant

for lack of consent to such jurisdiction on the part of the Government of Portugal, the Government of Japan, the Allied Powers in Japan and the United States Military Government in Japan, and on the part of each of them.

(24) Neither the United States nor this court has jurisdiction over the cause for lack of the consent to such jurisdiction of the Government of Portugal, the Government of Japan, the Allied Powers in Japan and the United States Military Government in Japan, and of the consent of each of them.

(25) The cause is barred by the limitation against prosecution, trial and punishment provisions of Title 18, USCA, Section 582, providing that "No person shall be prosecuted, tried, or punished for any offense, not capital, except as provided in section 1046 (section 584 of this title), unless the indictment is found, or the information is instituted, within three years next after such offense shall have been committed," and by the provisions of Title 18 USCA, Sec. 3282, which set up a limitation against prosecution, trial and punishment for offenses not capital unless the indictment is found within three years next after such offense shall have been committed.

(26) The cause is barred by the limitation of prosecution, trial and punishment provisions of Title 18 USCA, Section 581, which provides that "No person shall be prosecuted, tried, or punished for treason or other capital offense, wilful murder ex-

cepted, unless the indictment is found within three years next after such treason or capital offense is done or committed," said statute not being repealed by the Act of Aug. 4, 1939, c. 419, sec. 1, 53 Stat. 1198, codified as Title 18 USCA, secs. 581a and 581b and Sec. 3281, effective Sept. 1, 1948, which authorize an indictment for any offense punishable by death to be found at any time without regard to any statute of limitations but, clearly does not authorize either a prosecution, trial or punishment for treason committed three years before indictment found, treason not necessarily being an offense punishable by death, those new sections merely authorizing a grand jury to return an indictment in such a case.

This motion will be made upon the indictment, this motion, notice thereof, affidavits, documents, records and papers in support thereof to be submitted thereon, points and authorities, motion to dismiss the indictment filed herein concurrently herewith, and all other pleadings, papers and files herein and upon any evidence that may be adduced in support of this motion at the time the same is heard.

/s/ WAYNE M. COLLINS,
Attorney for Defendant.

[Endorsed]: Filed November 15, 1948.

Affidavit in Support of Motions to Dismiss

State of California,
Northern District of California,
City and County of San Francisco—ss.

Jun Toguri, being first duly sworn, deposes and says:

My name is Jun Toguri. I am a widower. I am 66 years of age. I am a grocer by occupation. My place of business is situated at 1128 North Clark Street, Chicago, Ill. I reside at 1012 North Clark Street, Chicago, Ill., which has been my home ever since September, 1944.

I was born at Yamanashi Ken, in Japan, on March 25, 1882, of full Japanese blood, and ever since then I have been and now am a national and citizen of Japan. I graduated from the Jikyo Kan school in Yamanashi Ken, Japan.

On or about June 8, 1907, I was lawfully united in marriage, at Yokohama, Japan, to Fumi Iimuro, a full blooded Japanese who was born in Tokyo, Japan, on or about February 14, 1888, and who, continuously until her death at the Tulare Assembly Center, Tulare County, California, on May 24, 1942, was a national and citizen of Japan.

I was lawfully admitted to the United States for permanent residence on or about September, 1899, at Seattle, Washington. Fumi Toguri, nee Iimuro, my said wife, now deceased, was lawfully admitted to the United States for permanent residence on or about November 1, 1913, at San Francisco, California.

Iva Ikuko Toguri d'Aquino, the defendant in criminal proceeding No. 31712 R now pending in the United States District Court for the Northern District of California, Southern Division, which was filed therein on October 8, 1948, is my natural daughter and the natural daughter of my said wife, Fumi Toguri, nee Iimuro, deceased, born during wedlock.

My daughter, Iva Ikuko Toguri d'Aquino, ever since July 25, 1941, has been and now is a resident of Tokyo, Japan, albeit since on or about September 3, 1948, she has not physically been present in Japan by virtue of her removal therefrom by agents of the United States to San Francisco, California.

On April 19, 1945, my said daughter, Iva Ikuko Toguri, then and now an adult female, lawfully was united in marriage to one, Felipe J. d'Aquino, an adult male, at the Sofia University Chapel in Tokyo, Japan, according to the rites of the Roman Catholic Church and faith of which Church and faith each of them then was and now is a member. That said marriage then was and ever since then has been and now is lawful according to the law of Portugal and of Japan and, as such, is recognized as being lawful by the law of the United States. Ever since her said marriage said Iva Ikuko Toguri d'Aquino, my daughter, has resided continuously with her said husband at their home and residence situated at No. 396 Ikejiri Machi, Setagaya-Ku, Tokyo, Japan.

The said Felipe J. d'Aquino, who is my son-in-law by virtue of his said marriage to my said daugh-

ter, was born at Yokohama, Japan, on or about March 26, 1919. He is a linotype operator and proof reader by occupation.

The father of said Felipe J. d'Aquino is Jose F. d'Aquino who resides in Atsugi, Kanagawa Ken, Japan, and is a person of half Portuguese blood derived from his father, the paternal grandfather of said Felipe J. d'Aquino, who was a person of full Portuguese blood and a national, citizen and domiciliary of Portugal, and said Jose F. d'Aquino ever since his birth has been and now is a national, citizen and domiciliary of Portugal and is a resident of Japan. The mother of said Felipe J. d'Aquino is Maria d'Aquino who resides with her husband, the said Jose F. d'Aquino, at Atsugi, Kanagawa Ken, Japan, and is a person of full Japanese blood, maternally and paternally, and is a national, citizen and domiciliary of Portugal, by reason of her said marriage to her said Portuguese husband. The said Jose F. d'Aquino and the said Maria d'Aquino, his wife, ever since the birth of their natural son, the said Felipe J. d'Aquino, have been and now are lawful residents of Japan. The said Felipe J. d'Aquino is $\frac{1}{4}$ th Portuguese blood and $\frac{3}{4}$ ths Japanese blood.

The said Felipe J. d'Aquino, according to the law of Portugal, as also the law of Japan, ever since his said birth has been and now is a national, citizen and domiciliary of Portugal, derived from his said father and mother, to the exclusion of any claim of any government, other than Portugal, to

his allegiance; and, ever since his said birth he has been and now is a lawful resident of Japan, presently residing therein at No. 396 Ikejiri Machi, Setagaya-Ku, Tokyo, Japan, the home and residence of said Felipe J. d'Aquino and said Iva Ikuko Toguri d'Aquino, his wife. The said exclusive Portuguese nationality, citizenship and domicile of said Felipe J. d'Aquino ever since his birth continuously has been and now is lawful and valid according to the law of Portugal and of Japan, as also according to the law of the United States.

/s/ JUN TOGURI,
Affiant.

Subscribed and sworn to before me this 15th day of November, 1948.

[Seal] /s/ JANE M. DOUGHERTY,
Notary Public in and for the City and County of
San Francisco, State of California.

Receipt of copy acknowledged.

[Endorsed]: Filed November 15, 1948.

[Title of District Court and Cause.]

NOTICE OF MOTION FOR
BILL OF PARTICULARS

To Hon. Frank J. Hennessy, U. S. Attorney, Attorney for Plaintiff:

You will please take notice that on Monday, November , 1948, at the hour of 10 o'clock a.m. of

said day, or so soon thereafter as counsel can be heard, the defendant will move the above-entitled Court for an order requiring the plaintiff to furnish defendant with the Bill of Particulars as set forth in the within Motion for Bill of Particulars.

/s/ WAYNE M. COLLINS,
Attorney for Defendant.

[Title of District Court and Cause.]

MOTION FOR BILL OF PARTICULARS

Iva Ikuko Toguri D'Aquino, defendant, by her attorney, moves the Court for an order requiring the United States of America, plaintiff, to file and furnish her with a Bill of Particulars, acts, facts and things as to the following matters which are so vague, indefinite, uncertain, ambiguous, evasive, equivocal and contradictory, and improperly and generally alleged, or attempted to be alleged, in the indictment returned against her in this cause, or omitted therefrom, in the following matters and respects and for the following reasons, to-wit:

1. A statement of the particular place or places to which the word "elsewhere" on the last line of paragraph 2 on line 13 of page 2 of the indictment refers.

2. A statement of the particular place or places to which the word "elsewhere" in paragraph 3(a) on line 25 of page 2 of the indictment refers.

3. A statement of the particular place or places to which the word "elsewhere" in paragraph 3(b) on line 29 of page 2 of the indictment refers.

The defendant states that the words "elsewhere" in each of the three instances above referred to is a word of broad and general meaning and is so unspecific and uncertain as to be susceptible of different interpretations and, consequently, in nowise advises or informs her as to its use, meaning, significance and relevancy to the purported cause of action.

4. A statement of the respect or respects in which the Broadcasting Corporation of Japan was controlled by the Imperial Japanese Government, as alleged in paragraph 3(a) on page 2 of the indictment, or the meaning of the word "controlled" as therein used.

The defendant states that the word "controlled" in the phrase "the Broadcasting Corporation of Japan, a company controlled by the Imperial Japanese Government," in paragraph 3(a) on page 2 of the indictment, is a word of broad and general meaning and is so unspecific and uncertain as to be susceptible of different meanings and interpretations and, consequently, in nowise advises or informs her of the nature and facts of said control or of its relevancy to the purported cause of action.

5. A statement whether or not the alleged adherence of the defendant and the giving of aid and

comfort to the enemies specified generally in paragraph 3 on pages 2 and 3 of the indictment actually had the effect or result of aiding and comforting the enemies of the United States and, if so, in what respect or respects.

The allegations of adherence to the enemies by giving them aid and comfort in paragraph 3(a) on page 2 of the indictment are couched in general language and are so broad and of such a general meaning and significance and are so unspecific and uncertain as to the particular facts, nature and character thereof as to leave the defendant completely in the dark as to the facts, conduct or things constituting the alleged adherence, aid and comfort. Further, nowhere therein or elsewhere in the indictment is there any allegation whatever that alleged adherence, aid and comfort of the defendant to the enemies, so generally pleaded in the indictment, actually had the effect or result of destroying confidence in the war effort of the United States and its Allies, and of undermining and lowering American and Allied military morale, and of creating nostalgia in the minds of the American and Allied forces, and of creating war weariness among members of the American and Allied armed forces, and of discouraging members of the American and Allied armed forces, and of impairing the capacity of the United States to wage war against its enemies, or of any of said things. The indictment is wholly deficient in said respects. Those very ma-

terial allegations are entirely missing in the indictment and, in consequence, if anything is pleaded therein it is simply that the defendant entertained a mental intent to commit or merely attempted treason. However, neither of such offenses is known to American law. In consequence, the language in said paragraph 3(a) is entirely too general and sets forth nothing but broad and general acts and conduct which, in themselves, are entirely harmless and innocent and, therefore, utterly insufficient to constitute the crime attempted to be charged. Although the indictment alleges legal conclusions of a crime of treason it fails to set forth any ultimate facts constituting such a crime and is utterly lacking in any allegation of facts charging or showing that any act or conduct of the defendant had any such effect or result and, consequently, fails to allege a completed [copy missing] The type of the pleading contained in the indictment would compel the defendant, the court and jury to resort to speculation to determine the nature of the accusation and the ultimate facts constituting the purported crime. In addition, it in nowise informs the defendant of the nature and facts of the crime it attempts to allege and wholly fails to allege that the purported crime was completed.

6. A statement of the precise or approximate time or times the defendant worked, announced and wrote radio script as alleged in paragraph 3(a) on page 2 of the indictment.

7. A statement of the nature, character and contents, in substance or effect, of the statements made by defendant as a radio speaker, radio announcer and broadcaster of recorded music alleged in paragraph 3(a) on page 2 of the indictment.

8. A statement of the nature, character and contents, in substance or effect, of the radio script prepared or composed by the defendant and of her talks and announcements and announcements of radio script alleged in paragraph 3(a) on page 2 of the indictment.

9. A statement of the nature and contents, in substance or effect, of the announcements and introductions made by the defendant of musical recordings and talks for broadcast by radio from Japan alleged in paragraph 3(a) on page 2 of the indictment, and the names of the record musical pieces or recordings broadcast by radio.

Neither the precise nor the approximate time or times of the occurrences of the matters alleged in paragraph 3(a) of the indictment are set forth therein nor is there any statement therein of the nature, character and contents of the acts and conduct of the defendant alleged to have been made by her as a radio speaker, announcer and broadcaster, that is to say, of the material ultimate facts. Neither the nature, character nor contents of the radio script prepared and composed by the defendant or of her talks and announcements, and announcements

of radio script, or the names of the musical recordings she is asserted to have broadcast, are set forth therein. In consequence, the defendant cannot ascertain therefrom and is neither advised nor informed thereby in what respect or respects, if any, in which the radio script, announcing and broadcasting, and musical recordings broadcasted were unlawful and is neither advised nor informed as to the nature and character thereof. She, therefore, requests that she be advised specifically as to these particulars and of what is intended to be charged against her, and that she be supplied with copies of the said script with which she will be confronted at the trial in the prosecution's attempt to prove these charges and with a statement, in substance or effect, of the precise and actual nature, character and contents of the talks, announcements and broadcasts she is alleged to have made which the prosecution will attempt to prove at the trial and the respects and particulars wherein the same were treasonable or are asserted or will be asserted to be of a treasonable nature at any trial of the issues which may be had herein.

10. A statement of the name of the "another person," mentioned in overt act No. 1 in paragraph 1 on page 3 of the indictment, with whom the defendant discussed the proposed participation of defendant in the radio broadcasting program therein mentioned.

The name of the "another person" is not alleged in the indictment to be unknown to the grand jurors and, in consequence, it is to be presumed that the name of such person actually was known to them and to plaintiff and that it, therefore, should have been alleged therein. Without the name of the person and the precise or approximate time the discussion was had being revealed (the time there specified extends over a period of two calendar months) the defendant is not informed either when or with whom she is charged with having the discussion and is unable to ascertain whether she at any time had a discussion with any specific person and is neither advised nor informed as to what the allegation means.

11. A statement of the precise or approximate time when overt act No. 1, mentioned in paragraph 1 on page 3 of the indictment, took place together with a statement of the words spoken by each, in substance or effect, in the discussion therein mentioned and the nature of the discussion.

12. A statement of the precise or approximate time when overt act No. 2, mentioned in paragraph 2 on page 3 of the indictment, took place, together with the names and addresses of the employees of the Broadcasting Corporation of Japan with whom the defendant is alleged to have had the discussion therein alleged, together with a statement of the words spoken, in substance or effect, by each of them and defendant, in that discussion.

13. A statement of the precise or approximate time when overt act No. 3, mentioned in paragraph 2 on page 4 of the indictment, took place, together with the words spoken by defendant into the microphone, in substance or effect, and the nature of the statements made.

14. A statement of the precise or approximate time when overt act No. 4, mentioned in paragraph 4 on page 4 of the indictment, took place, together with the words spoken by defendant, in substance or effect, into the microphone and also a statement, in substance or effect, of the precise reference alleged therein to have been made by her concerning enemies of Japan.

15. A statement of the precise or approximate time when overt act No. 5, mentioned in paragraph 5 on page 4 of the indictment, took place, together with the nature and contents, in substance and effect, of the script prepared for subsequent radio broadcast concerning the loss of ships, the ships to which it referred and the precise statement which was made concerning the loss of ships, either in substance or effect.

16. A statement of the precise or approximate time when overt act No. 6, mentioned in paragraph 6 on page 4 of the indictment, took place, together with the words which were spoken, in substance or effect, concerning the loss of ships, together with a

statement of what ships the statement referred to.

17. A statement of the precise or approximate time when overt act No. 7, mentioned in paragraph 7 on page 4 of the indictment, took place, together with a statement of the nature and contents, in substance or effect, of the radio script therein alleged to have been prepared.

18. A statement of the precise or approximate time when overt act No. 8, mentioned in paragraph 8 on page 4 of the indictment, took place, together with the words, in substance or effect, which were spoken into the microphone and the names of each of the persons who engaged in the entertainment dialogue therein mentioned and the words spoken, in substance or effect, by each of the participants in the entertainment dialogue therein mentioned.

Each of the eight acts alleged in the indictment to be overt acts are alleged in terms so general, broad, loose, uncertain, unspecific, unrevealing and concealing as to time and as to facts sought to be elicited in the eight particulars hereinabove set forth that they are susceptible to nothing but speculation and guesswork. Each of those overt acts as alleged in the indictment are allegations of matters which on their face are absolutely innocent and innocuous matters. Inasmuch as these special allegations of overt acts modify and control the general allegations of the purported crime and are innocent on their face the indictment in nowise advises or

informs the defendant of the accusation against her but leaves all these important matters to the imagination.

19. A statement of the times and places where defendant was arrested in Japan and confined to prison by agents of the United States, and thereafter released therefrom, the periods of time of said imprisonments, the authority and purpose for the said arrests and commitments to imprisonment and discharges therefrom, and a statement of the purpose for which and the authority under which defendant was arrested in Japan and brought to San Francisco in this Federal Judicial District shortly prior to the date of the return of the indictment herein, as alleged in the final paragraph on page 4 of the indictment, and also a statement whether or not each of her said arrests and imprisonments and releases therefrom, and her removal from Japan to San Francisco, and each of said things, were done with the consent and authority of the Allied Powers, the government of Portugal, and the government of Japan or of any of said sovereign powers.

Inasmuch as the foregoing particulars, facts and details are not fully alleged in the indictment the defendant is neither advised nor informed thereby of the legal authority, if any existed at the time of said occurrences or now exists, for her arrests and imprisonments in Japan and discharges therefrom and her removal to San Francisco and whether this court has acquired and has any jurisdiction over

her person and over the cause, it appearing on the face of the indictment that the arrest of defendant in Japan and her removal to this jurisdiction was an illegal extraterritorial act of the United States wholly outside its jurisdiction which did not and could not confer jurisdiction over the defendant and of the cause upon this court or confer lawful venue hereof upon this court. The indictment fails to set forth and, therefore, to inform the defendant and this court whether or not the arrests, imprisonments and removal of defendant from Japan to the United States was authorized by or consented to by the Allied Powers, the government of Portugal, and the government of Japan, or any of said sovereign powers, in consequence of which, neither the defendant nor the court can ascertain what authority, if any, existed therefor or ascertain whether the court has jurisdiction over the defendant or over the cause.

20. A statement whether the employment of defendant as a radio operator, radio announcer, radio script writer and broadcaster of recorded music, as alleged in paragraph 3(a) of the indictment, was or was not in a capacity for which only Japanese nationals were eligible.

It cannot be ascertained therefrom whether or not the said acceptance of employment by defendant in said corporation was in a capacity for which Japanese nationals only were eligible, a fact which is material to the cause and jurisdiction of the court as bearing on the legal conclusion that such a type of employment in and of itself constituted an act of

expatriation according to our law whereby a person thereby loses the nationality then possessed and thereby becomes either a foreign subject or acquires a foreign nationality, by operation of U. S. law.

21. A statement of the facts upon which are based the conclusions in the indictment, in paragraph 1 on page 1, paragraph 2 on page 2, and paragraph on top of page 4, that defendant is a citizen of the United States and a person owing allegiance to the United States.

22. A statement whether or not the defendant at Tokyo, Japan, was united in marriage to her now husband, Felipe J. D'Aquino, on April 19, 1945, who then was and ever since then has been and now is a national, citizen and domiciliary of Portugal residing in Japan.

It appears from the indictment that the defendant is a married person and a resident of Japan and, therefore, is presumed to be a foreigner who was brought to San Francisco in the custody of U. S. agents from which it follows that, by operation of law, she is a foreign national and, in consequence, defendant requests that the plaintiff be required to state openly and unequivocally whether or not defendant is and long has been exclusively a national, citizen and domiciliary of Portugal, lawfully residing in Japan, and whether or not she acquired that political status upon and by virtue of her marriage to a Portuguese national, citizen and domiciliary resident in Japan on April 19, 1945.

23. A statement whether or not the United States heretofore, within the past three years, arrested defendant thrice or at all in Japan on the same accusation of treason as charged in the indictment herein and imprisoned her thrice and thereafter, acquitted her of the charges or convicted her thereon or sentenced or imprisoned her thereon and thereafter liberated her from such imprisonment at any time and, if so, when.

The indictment is silent on these material particulars although the facts thereof are peculiarly within the knowledge of the plaintiff. The fact of a prior acquittal (*autrefois acquit*) or conviction is a bar to the present accusation and the indictment is barred by the constitutional provision against subjecting defendant twice for the same offense and twice putting her in in jeopardy of life or limb for the same offense and for inflicting upon her a prohibited repetition of penalty which is cruel and unusual punishment.

Each of the foregoing 23 specified particulars and their details, in which the indictment is fundamentally lacking, are essential and necessary to advise and inform the defendant of the nature of the accusation against her with sufficient precision to enable her to learn the nature thereof, to enable her to prepare her defense thereto, to prevent her from being taken by surprise at any trial of the issues herein and to enable her to plead the conclusion thereof in bar of another prosecution on the same charge.

The defendant states to the Court that this application and motion for a bill of particulars is filed in good faith; that it is not filed for the purpose of delay, and that it is filed and made so that she may inform herself of the nature and cause of the accusation against her and thereby enable her properly to prepare her defense.

Dated: November 15, 1948.

/s/ WAYNE M. COLLINS,
Attorney for Defendant.

State of California,
City and County of San Francisco—ss:

Wayne M. Collins, being first duly sworn, deposes and says: that he is attorney of record for Iva Ikuko Toguri D'Aquino, defendant herein; that he has read the foregoing Motion for Bill of Particulars and knows the contents thereof; that he verily believes the fact to be that the indictment is vague, indefinite, uncertain and deficient in the respects, particulars and details specified in said Motion; that the defendant cannot safely go to trial on the indictment herein without the particulars and details of the matters specified in the said Motion and that said particulars and details are essential and necessary to inform defendant of the nature of the accusation against her with sufficient precision to enable her to prepare for any trial of the cause that may be had herein, to prevent her from being taken by surprise thereat and to permit her to plead the

conclusion thereof in bar of another prosecution on the same charge.

/s/ WAYNE M. COLLINS.

Subscribed and sworn to before me this 15th day of November, 1948.

[Seal] /s/ JANE M. DOUGHERTY,
Notary Public in and for the City and County of
San Francisco, State of California.

Points and Authorities in Support of Motion
for Bill of Particulars

If an indictment fails to allege offenses charged with sufficient fullness and definiteness as to time, place, and other circumstances and more precise information is needed it should be obtained by a bill of particulars.

Peck v. U.S. (CCA-7), 65 Fed. 2d. 59, 61,
cert. den. 290 U.S. 701.

See also: Saul Samuel et al. v. U.S. (CCA-9),
169 Fed. 2d. 787, 791, decided Aug. 20, 1948.

Billingsley v. U.S. (CCA-8), 16 Fed. 2d. 754,
755, where denial was held prejudicial error.

If charges in an indictment are so general that they do not advise the accused specifically of the acts of which he is accused the deficiencies must be supplied by a bill of particulars.

Wilson v. U.S. (CCA-NY), 275 Fed. 307, 310-
311, cert. den. 257 U.S. 649.

The office of a bill of particulars is to inform the accused of the nature of the charge with sufficient precision to enable him to prepare for trial, prevent surprise and to plead his acquittal or conviction in bar of another prosecution for the same offense.

U.S. v. Aluminum Co. (DCNY) 41 F.S. 347, 348.

9 Hughes Fed. Prac. pg. 515, sec. 7046.

10 C. J. S. pg. 1096.

Respectfully submitted,

/s/ WAYNE M. COLLINS,

Attorney for Defendant.

[Endorsed]: Filed November 15, 1948.

District Court of the United States, Northern District of California, Southern Division

At a Stated Term of the District Court of the United States for the Northern District of California, Southern Division, held at the Court Room thereof, in the City and County of San Francisco, on Monday, the 3rd day of January, in the year of our Lord one thousand nine hundred and forty-nine.

Present: The Honorable Michael J. Roche,
District Judge.

[Title of Cause.]

ORDER

(Minute order that Motion for Bill of Particulars, Motion to Dismiss Indictment be denied, and that Motion for Discovery and Inspection be granted as to request number 7 but denied as to remaining requests, and that Motion to Strike Indictment be denied.) (Plea of "Not Guilty.")

This cause came on this day for entry of plea, also for hearing on following motions: motion to dismiss Indictment, motion to strike, motion for discovery and inspection, motion for bill of particulars. The defendant, Iva Ikuko Toguri D'Aquino, was present in the custody of the U. S. Marshal and with her attorney, Wayne Collins, Esq. Tom De Wolfe, Esq., Special Assistant to the Attorney General, was present on behalf of the United States.

It is Ordered that the Motion for Bill of Particulars made pursuant to Rule 7(f) of the Rules of Criminal Procedure be and the same is hereby denied. That the Motion to dismiss the Indictment for failure to allege an offense be and the same is hereby denied. That the motion to dismiss the Indictment made pursuant to Rule 12(b) of the Rules of Criminal Procedure be and the same is hereby denied. That the Motion for discovery and inspection made pursuant to Rule 16 of the Rules of Criminal Procedure be granted as to request number

seven (7), and as to the remaining requests be and the same is hereby denied. That the Motion to strike the Indictment be and the same is hereby denied.

The defendant was called to plead and thereupon said defendant entered a plea of "Not Guilty" to the Indictment filed herein against her, which said plea was ordered entered.

On motion of Mr. Collins and with consent of Mr. De Wolfe, it is Ordered that this case be set for trial on May 16, 1949. (Jury)

[Title of District Court and Cause.]

NOTICE

To Frank J. Hennessy, United States Attorney,
and to Tom DeWolfe, Special Assistant to the
Attorney General, Attorneys for the Plaintiff

You and each of you will please take notice that on Monday, the 7th day of March, 1949, at the Courtroom of the above-entitled Court, 3rd Floor, Post Office Building, 7th and Mission Streets, San Francisco, California, at the hour of 2 o'clock p.m. of said day, or so soon thereafter as counsel can be heard, the defendant will bring on for hearing the within motions.

Dated: March 1, 1949.

/s/ WAYNE M. COLLINS,
Attorney for Defendant.

[Title of District Court and Cause.]

I.

MOTION FOR ORDER AUTHORIZING AND
DIRECTING ISSUANCE OF SUBPOENAS
REQUIRING ATTENDANCE OF WIT-
NESSES IN A FOREIGN COUNTRY AT
THE TRIAL HEREIN AT THE EXPENSE
OF THE GOVERNMENT AND FOR SERV-
ICE THEREOF

The defendant, Iva Ikuko Toguri d'Aquino, moves the Court for its order authorizing and directing the issuance of subpoenas requiring the attendance of the hereinafter named witnesses, residing abroad at the places hereinafter set forth, at the trial herein at the expense of the plaintiff, the U. S. Government, and for the service of said process of court.

The names, addresses and nationalities and citizenship of the witnesses whose names are known to defendant and the necessary and material testimony the defendant expects them to give at the trial herein are as set forth in the affidavit of the defendant filed in support of this motion which hereby is incorporated herein by reference. Each of the said witnesses named in said affidavit, together with others whose names are not presently known to defendant, is a necessary and material witness for the defendant on the trial of this cause and a witness whose testimony is necessary and material to the defendant in her defense to said action, the materiality of their testimony being set forth in the

defendant's affidavit filed in support of this motion.

The defendant cannot safely proceed to a trial of said action without the production of the person of each of said witnesses in court at the trial herein to testify in person so that their individual testimony, attitudes and demeanors can be observed, considered and weighed by the Court and the jury. The failure of the Court to order the production of said witnesses at the trial herein and the failure of the Government to produce or allow them to be produced at the expense of the Government will result in a failure of justice and deprive the defendant of her substantial constitutional and statutory rights to a fair and impartial trial and to obtain witnesses in her favor, in violation of the provisions of the Sixth Amendment and the due process guaranty of the Fifth Amendment of the Constitution.

II.

MOTION TO DISMISS THE INDICTMENT

In the event the defendant's foregoing Motion No. I is denied the defendant moves the Court to dismiss the indictment and discharge the defendant from custody on the grounds that the denial thereof deprived the Court of jurisdiction to proceed in the cause and that it deprived the defendant of her right to a fair and impartial trial by jury and of her right to obtain witnesses in her own defense, in violation of the provisions of the Sixth Amendment and of the due process guaranty of the Fifth Amendment of the Constitution.

III.

**MOTION THAT COURT CONDUCT PART OF
TRIAL BY JURY IN TOKYO, JAPAN,
HONG KONG, CHINA, and SYDNEY, AUS-
TRALIA**

In the event the foregoing Motion No. II is denied the defendant moves the Court to order part of the trial of the defendant by jury to be held and conducted in Tokyo, Japan, Hong Kong, China, and Sydney, Australia, to suit the convenience of the citizen and alien witnesses residing in said foreign countries whose names, residences and nationalities are set forth in defendant's affidavit filed in support of this motion and whose testimony is necessary and material to her defense at her trial herein, as also set forth in said affidavit, and for the purpose of obtaining said testimony, at the expense of the United States government and that the travel expenses and subsistence expenses of defendant's attorney for representing her thereat be defrayed by the United States government for the reason that she cannot bear said expenses or any part thereof, as appears by the affidavit of the defendant filed in support of this motion.

IV.

MOTION TO DISMISS THE INDICTMENT

In the event the defendant's foregoing Motion No. III is denied the defendant moves the Court to dis-

miss the indictment upon the grounds that the Court thereby lost jurisdiction to proceed in the cause, and that such effectively has deprived the accused defendant of her right to a fair, speedy and impartial public trial, by an impartial jury in the District and deprived her of the right to have compulsory process for obtaining witnesses in her favor, in violation of the provisions of the Sixth Amendment and the due process of law guaranteed to her by the Fifth Amendment of the Constitution.

V.

MOTION TO POSTPONE TRIAL OF THE
CAUSE AND EITHER TO DISCHARGE
DEFENDANT FROM CUSTODY OR TO
ADMIT HER TO BAIL PENDING SUCH
TIME AS THE GOVERNMENT PROVIDES
FOR THE PRODUCTION OF DEFEND-
ANT'S WITNESSES FROM ABROAD TO
TESTIFY IN PERSON AT THE TRIAL
HEREIN

In the event the defendant's foregoing Motion No. IV is denied the defendant moves the Court to postpone the trial of the cause and either to discharge the defendant from custody or to admit her to bail pending such time as the government provides for the production of defendant's witnesses from abroad at the expense of the Government upon the grounds that the Court has no jurisdiction to pro-

ceed further with the trial of said cause and that to compel the defendant to stand trial under such circumstances deprives her of a fair, speedy and impartial trial and to have compulsory process for obtaining witnesses in her favor, in violation of the provisions of the Sixth Amendment and the due process of law guaranty of the Fifth Amendment of the Constitution.

VI.

MOTION TO DISMISS THE INDICTMENT

In the event the defendant's foregoing Motion No. V is denied the defendant moves the Court to dismiss the indictment and discharge the defendant from custody on the grounds the denial thereof deprived the Court of jurisdiction to proceed in the cause and that it deprived the defendant of her right to a fair and impartial trial by jury and deprived her of the right to obtain witnesses in her own defense, in violation of the provisions of the Sixth Amendment and of the due process guaranty of the Fifth Amendment of the Constitution.

VII.

MOTION FOR ORDER AUTHORIZING AND DIRECTING ISSUANCE OF SUBPOENAS REQUIRING ATTENDANCE OF WITNESSES ABROAD AT THE TAKING OF THEIR DEPOSITIONS AND PROVIDING FOR THE TAKING OF DEPOSITIONS OF FOREIGNERS AND CITIZENS ABROAD, AT THE EXPENSE OF THE GOVERNMENT, INCLUDING THE EXPENSES OF TRAVEL AND SUBSISTENCE OF DEFENDANT'S ATTORNEY AND INVESTIGATOR-INTERPRETER FOR INTERVIEWING WITNESSES AND FOR ATTENDANCE AT THE EXAMINATIONS

In the event the defendant's foregoing Motion No. VI is denied, the defendant moves the Court, under Rule 17 of the Rules of Criminal Procedure, for its order authorizing and directing the issuance and service of subpoenas for the taking of the oral depositions of the hereinafter named persons who reside in the foreign countries shown after their names and who, according to the best knowledge, information and belief are citizens of the United States, Portugal, France, Australia or Great Britain, or Japan, as shown in the affidavit of the defendant filed in support of this motion, to be taken in Tokyo, Japan, and elsewhere in Japan, in Hong Kong, China, and Sydney, Australia, respectively, at the expense of the United States government on the grounds and

for the reason that the defendant cannot bear the expense thereof;

The defendant also moves the Court for the expenses of travel from San Francisco, California, to Tokyo, Japan, Hong Kong, China, and Sydney, Australia, and return therefrom, and subsistence of her attorney for attendance at the examinations of said witnesses on the taking of said depositions at the expense of the United States government on the grounds and for the reason that the defendant cannot bear the expense thereof;

The names of the witnesses whose depositions the defendant desires to be taken, their nationalities insofar as known to defendant and her counsel, their places of residence and the place where their depositions can be taken are as follows:

Name	Nationality	Residence	Place of Deposition
1. Hon. Lars Tillitse	Danish	Tokyo, Japan	Tokyo, Japan
2. Hon. J. A. Abranches Pinto	Portuguese	Tokyo, Japan	Tokyo, Japan
3. S.Lt. Nicklos Schenk	Dutch	Tokyo, Japan	Tokyo, Japan
4. Mr. Takano	Japanese	Tokyo, Japan	Tokyo, Japan
5. Mr. George Togasaki	Japanese	Tokyo, Japan	Tokyo, Japan
6. Ruth Sumi Hayakawa	Japanese	Tokyo, Japan	Tokyo, Japan
7. Mr. Ken Inouye	U.S. Citizen	Tokyo, Japan	Tokyo, Japan
8. Mr. Kazuya Matsumiya	Japanese	Tokyo, Japan	Tokyo, Japan
9. Sr. Jose Filomino d'Aquino	Portuguese	Atsugi, Japan	Tokyo, Japan
10. Sra. Maria d'Aquino	Portuguese	Atsugi, Japan	Tokyo, Japan
11. Mr. Thaddeus d'Aquino	Portuguese	Hong Kong, China	Hong Kong, China
12. Felipe J. d'Aquino	Portuguese	Tokyo, Japan	Tokyo, Japan
13. Mrs. Unami Kido	Japanese	Tokyo, Japan	Tokyo, Japan
14. Miss or Mrs. Yoneko Matsunaga	Japanese	Tokyo, Japan	Tokyo, Japan
15. Charles Yoshii	Japanese	Tokyo, Japan	Tokyo, Japan
16. Miss Founy Saisho	Japanese	Tokyo, Japan	Tokyo, Japan
17. Mr. Hisashi Moriyama	Japanese	Tokyo, Japan	Tokyo, Japan
18. Mr. Katsuo Okada	Japanese	Tokyo, Japan	Tokyo, Japan

Name	Nationality	Residence	Place of Deposition
19. Mr. Mugio Hattori	Japanese	Tokyo, Japan	Tokyo, Japan
20. Mr. George Nakamoto	Japanese	Tokyo, Japan	Tokyo, Japan
21. Gen. Douglas MacArthur	U.S. Citizen	Tokyo, Japan	Tokyo, Japan
22. Maj. Gen. Charles Willoughby	U.S. Citizen	Tokyo, Japan	Tokyo, Japan
23. U.S. Army Officer in Charge of Sugamo Prison	U.S. Citizen	Tokyo, Japan	Tokyo, Japan
24. U.S. Army Officer in Charge of Yokohama Prison	U.S. Citizen	Yokohama, Japan	Tokyo, Japan
25. Father Desmoulins	French	Tokyo, Japan	Tokyo, Japan
26. Dr. Y. Amano	Japanese	Tokyo, Japan	Tokyo, Japan
27. Dr. Fumi Amano	Japanese	Tokyo, Japan	Tokyo, Japan
28. Mrs. Miyeko Oki, nec Furuya	Japanese	Tokyo, Japan	Tokyo, Japan
29. Mr. Ken Oki	Japanese	Tokyo, Japan	Tokyo, Japan
30. Mr. K. Uno	Japanese	Tokyo, Japan	Tokyo, Japan
31. Mr. Ken Ishii	Japanese	Tokyo, Japan	Tokyo, Japan
32. Miss Mary Ishii	British	Tokyo, Japan	Tokyo, Japan
33. Chief of Police Setagaya Ku, Tokyo, Japan	Japanese	Tokyo, Japan	Tokyo, Japan

Name	Nationality	Residence	Place of Deposition
34. Chief of Police, Shiba Ward, Tokyo, Japan.....	Japanese	Tokyo, Japan	Tokyo, Japan
35. Chief of Police, Atsugi, Japan	Japanese	Atsugi, Japan	Tokyo, Japan
36. Chief of Metropolitan Police, Tokyo, Japan	Japanese	Tokyo, Japan	Tokyo, Japan
37. Officer in Charge of Kempeitai records, Tokyo, Japan	Japanese or U.S. Citizen	Tokyo, Japan	Tokyo, Japan
38. Mr. Hanamaki Tozaki	Japanese	Tokyo, Japan	Tokyo, Japan
39. Charles C. Cousens	British	Sydney, Australia	Sydney, Australia
40. John Holland	British	Hong Kong, China	Hong Kong, China
41. General Manager or sub- ordinate officer in charge of employment and com- pensation records of Radio Tokyo, Tokyo, Japan	Japanese	Tokyo, Japan	Tokyo, Japan
42. Mr. Hifumi	Japanese	Japan	Tokyo, Japan
43. Mr. Takabataki	Japanese	Japan	Tokyo, Japan

This motion is made upon the ground that each of the named witnesses is a necessary and material witness for the defendant on the trial of said action and a witness whose testimony is necessary and material to the defendant in the defense of said action.

The facts to which each of said witnesses is expected to testify and the materiality of that testimony is set forth in the affidavit of the defendant filed in support of this motion and is incorporated herein by reference for said purposes.

The defendant cannot safely proceed to trial of said action without the testimony of said witnesses.

The taking of said depositions is the sole remaining avenue available to the defendant to obtain the testimony of said witnesses which is material and necessary to her defense at the trial herein and which is not available to defendant from any other source or sources save and except said witnesses who are in foreign countries, a majority of whom are in Japan from whence defendant was brought by agents of the United States, away from her home, husband, friends and witnesses.

Therefore, defendant moves that a commission issue to the United States Consul at Yokohama, Japan, or Kobe, Japan, for the purpose of taking the depositions of the aforesaid witnesses in Japan, at Tokyo, Yokohama or Kobe, Japan, as shall to him be convenient, commencing on or about April 1, 1949, at an hour convenient to him, and to continue thereafter, until the depositions of each said witness shall have been taken, or that, in lieu of

said method of taking said depositions, the depositions of such witnesses be taken by stipulation between the parties hereto in Japan during April, 1949, at such places and in such manner, before any person the respective attorneys for the parties hereto there shall agree upon.

Defendant, by her attorney, represents to the Court that the attorneys for the plaintiff have informed her attorney herein that they are willing to consent that the depositions of the defendant's witnesses, whether said witnesses be citizens or aliens abroad, may be taken in Japan and also in Hóng Kong and that, for said purpose will there provide for an attorney for the U. S. Government to be present at the taking thereof and to represent the plaintiff thereon and to do what they can to expedite the issuance of the necessary passports and also military permits from SCAP, Tokyo, for defendant's attorney and representative to enter Japan and there locate and interview defendant's witnesses, whosoever they may be, and to take their depositions there by stipulation without requiring court orders first authorizing the taking of the depositions of each of the aforesaid witnesses and of each other person who may be found in Japan to be a witness for the defendant whose deposition the defendant or her attorney there may desire to take.

The failure or refusal of the Court to order and authorize the depositions of said witnesses to be taken abroad and the failure of the U. S. Government to enable such depositions to be taken abroad

at the expense of the Government will result in a failure of justice and deprive the defendant of her substantial constitutional and statutory rights to a fair and impartial trial and to obtain witnesses in her favor, in violation of the provisions of the Sixth Amendment and the due process of law guaranty of the Fifth Amendment of the Constitution.

VIII.

MOTION TO DISMISS INDICTMENT

In the event the defendant's foregoing Motion No. VII is denied, or the military permits for defendant's attorney therein mentioned is denied by SCAP, Tokyo, the defendant moves the Court to dismiss the indictment and discharge the defendant from custody on the grounds the denial thereof deprived the Court of jurisdiction to proceed in the cause and that it deprived the defendant of her right to a fair and impartial trial by jury and deprived her of the right to obtain witnesses in her own defense, in violation of the provisions of the Sixth Amendment and of the due process of law guaranty of the Fifth Amendment of the Constitution.

Each of the foregoing motions will be made and based upon the notice of these motions, said motions, affidavit in support of said motions, and upon all the records, pleadings, files, court orders and documents on file herein.

/s/ WAYNE M. COLLINS,

Attorney for Defendant.

Points and Authorities in Support of Motions
Rules 15, 17 and 26, Rules of Criminal Procedure.
Compare, Rules 29 and 30, R.C.P.
Fifth Amendment, U. S. Constitution.
Sixth Amendment, U. S. Constitution.

Respectfully submitted,
/s/ WAYNE M. COLLINS,
Attorney for Defendant.

[Title of District Court and Cause.]

AFFIDAVIT IN SUPPORT OF MOTIONS

Northern District of California,
State of California,
City and County of San Francisco—ss.

Iva Ikuko Toguri d'Aquino, being first duly sworn, deposes and says: that she is the defendant in the above-entitled action and is detained under process of this Court, without bail, in San Francisco County Jail No. 3, Dunbar and Washington Streets, San Francisco, California; that she is an adult person over the age of twenty-one (21) years; that ever since on or about July 25, 1941, she has continuously resided in Tokyo, Japan, where, on April 19, 1945, she was lawfully united in marriage to one, Felipe J. d'Aquino, who then and ever since his birth has been and still is a national and citizen of Portugal residing in Tokyo, Japan; that she thereby and thereon, pursuant to the law of Portu-

gal, as also the law of Japan, as also by the law of all other civilized nations and by international law, became and ever since then continuously has been and now is a national and citizen of Portugal and in 1945 was formally naturalized as a Portuguese national by said marriage and by formal registration of said marriage as such a citizen of Portugal at the office of the Consul of Portugal at Tokyo, Japan; that ever since her said marriage she has resided at No. 396 Ikejiri Machi, Setagaya-Ku, Tokyo, Japan, with her said husband.

On August 26, 1948, defendant was arrested by agents of the United States, acting under orders of the Attorney General of the United States, and thereupon imprisoned in the Sugamo Prison, Tokyo, Japan, and thereafter was forcibly taken aboard the S. S. General F. R. Hodges, a U. S. transport vessel, on which she was brought to San Francisco, California, on September 25, 1948, and while said vessel was in progress of docking at said port she was seized by agents of the U. S. Federal Bureau of Investigation upon a purported complaint filed in this Court on September 25, 1948, was brought before the U. S. Commissioner in this District and thereafter was indicted in this cause which is now pending in this court.

The defendant is an indigent; aside from used clothing and a few personal effects, the reasonable value of which does not exceed Twenty-five (\$25.00) Dollars, she possesses the following assets only, viz., the equivalent of the sum of approximately One

Hundred (\$100.00) Dollars on deposit in the Postal Savings Bank in Tokyo, jointly with her husband in Tokyo, Japan, household furniture, dishes, trunk, sewing machine and utensils of the reasonable value of One Hundred (\$100.00) Dollars, and a remote claim or right, subservient to the right of the Attorney General as the Alien Property Custodian, in and to certain real property situated in Los Angeles County, California, described as follows, to-wit:

Lots 42 and 57 of the South Gate Tract in the Rancho Tajauta, as per map recorded in Book 13. Pages 14 and 15 of Maps in the office of the County Recorder of said County, and portion of the 538.28 acre track of land allotted to Jose Maria Abila in the partition of Rancho Tajauta, Case number 1200 of the 17th Judicial District Court in the County of Los Angeles,

which said property she is informed and believes has an approximate market value of Three Thousand Five Hundred (\$3,500.00) Dollars, the interest of the defendant therein, however, being at most a disputable claim and hence of substantially no value whatever to her.

By reason of her said poverty and indigency the defendant does not have sufficient means and is actually unable to bear the expense of producing her witnesses, hereinafter named, of any of them, to testify in person in her defense at the trial herein, or to bear the expense of their travel, subsistence and witness fees for attending or to have served the subpoenas for the taking of their depositions or any of them.

By reason of her said poverty and indigency the defendant does not have sufficient means and is actually unable to bear the expense of the taking of oral depositions of her said witnesses, or of any of them, and is unable to bear either the expenses of travel or subsistence of her attorney for attendance at the said examinations and the taking of said depositions abroad.

That each of the witnesses, hereinafter named, and named in her motion for the production of defendant's witnesses at the trial herein and in the motion for the taking of depositions is a necessary and material witness for the defendant on the trial of said action and the testimony of each is necessary and material to the defendant in her defense of said indictment.

That the defendant cannot safely proceed to a trial of said action without the testimony of said witnesses.

The witnesses whose testimony is necessary and material to be given at the trial herein or to be given by the depositions to be introduced in evidence at the trial herein, their places of residence, their nationalities and citizenships which are unknown to defendant but which she believes to be as hereinafter set forth, and the material and necessary testimony they are expected to give, in substance and effect, are as follows:

1. The Hon. Lars Tillitse, a citizen of Denmark, Danish Representative to SCAP, Tokyo, Japan, to testify that defendant was employed from on or

about January 1, 1944, to sometime in May, 1945, by the Royal Danish Legation in Tokyo, Japan, while he was Danish Minister to Japan; to the facts and circumstances how her said employment arose; the hours of her said employment, the days she so worked and the nature and duties of her employment, the days she was absent from her work; the compensation paid to her for said services; the conditions under which she lived in Japan, to the fact that she was subjected to constant police surveillance by the Kempeitai, ward and metropolitan police departments in Tokyo; her physical and mental condition, as observed by him during said period; the facts of her marriage to a Portuguese national and citizen on April 19, 1945, her registration and naturalization as a Portuguese citizen at the Portuguese Consulate in Tokyo in 1945; statements made by her to him and conversations defendant had with him during said period relating to her citizenship, activities and loyalty to and sympathy with the United States and its and the Allied cause; and that her reputation for truth and veracity in the community in Japan where she resides is excellent.

2. The Hon. J. A. Abranches Pinto, a Portuguese citizen, Consul of Portugal, Tokyo, Japan, to testify he has been acquainted with the defendant from 1943 to date; that he attended the wedding of defendant to Felipe J. d'Aquino, a Portuguese citizen, at Sophia University Chapel, Tokyo, Japan,

on April 19, 1945; that said marriage was registered at the Portuguese Consulate in Tokyo in 1945; that by said marriage and the defendant's formal registration thereof in 1945 at said consulate defendant became a naturalized citizen of Portugal and ever since then has been a national and citizen of Portugal; to testify to her registrations there as such in 1946, 1947 and 1948; to identify and testify to the formal registration certificates issued to her during each of said years; to testify, as an expert witness, duly qualified so to do, that by the law of Portugal said marriage and said registration in 1945 by the defendant constituted her formal naturalization as a Portuguese national and citizen; that defendant was kept under constant surveillance by the Kempeitai, ward and metropolitan police in Tokyo and was compelled to report to said agencies repeatedly from 1943 to the conclusion of hostilities by Japan's surrender in 1945 to the Allied Powers; and that defendant's reputation for truth and veracity in the community in Japan where she resides is excellent.

3. S. Lt. Nicklos Schenk, a citizen of Holland, Custodian Officer, Netherlands Legation, General Liaison, G. H. Q., Tokyo, Japan, to testify that from late 1943 to August, 1945, he was acquainted with the defendant while he was held as a prisoner of war by the Japanese in Tokyo, Japan; that he was frequently, during said period of time, at the Radio Tokyo broadcasting offices; that he then was and is acquainted with the females who there broad-

cast on the Zero Hour program during said period of time; to testify to their names and addresses and to testify to the nature and content of their broadcasts and to identify them and to distinguish them from the defendant; that the recorded music played on the prisoner of war Zero Hour was lively in character and was calculated to and did bolster the morale of U. S. and Allied troops; that the defendant never committed any of the unlawful acts mentioned in the indictment herein; that the defendant neither by word nor deed did anything to injure, harm or betray the cause of the United States or its Allies; that a large number of Allied prisoners of war there were held by the Japanese under duress and were coerced into radio broadcasting for the Japanese; that, at great personal risk the defendant, during said period of time, secretly and repeatedly conveyed to U. S. and Allied prisoners of war, there held by the Japanese, news of the progress of U. S. and Allied armed forces and news of U. S. and Allied military and naval successes for the purpose of bolstering up their spirits, courage and hopes and secretly, at like great personal risk, supplied to them food, cigarettes, blankets and medicine; and that she gave comfort to said prisoners of war and aided them in their efforts to defeat the purposes of their Japanese oppressors and to testify to the nature, manner and details of that aid and comfort; and that during the whole of said period of time the defendant had it within her power to report the United States and Allied

prisoners of war to the Kempeitai for their broadcasting activities in aiding the U. S. and Allied cause and thereby betray them to the enemy but knowingly failed and refused so to do and thereby aided the U. S. and Allied cause by keeping said matters and things secret from the Japanese.

4. Mr. Takano, Tokyo, Japan, a Japanese citizen, to testify he was manager of the business office of Radio Tokyo from about August, 1943, to about May, 1945; that he has been acquainted with the defendant since sometime in August, 1943; that he, in late 1943, upon the suggestions and prompting of other persons whose names are not at this time known to defendant, and upon what affiant is informed and believes and therefore alleges upon information and belief to have been a command or order of Japanese Army officers, ordered and compelled defendant to accept employment designated by him at Radio Tokyo and that defendant was coerced into so doing under duress and over her repeated protests against complying therewith; that the Zero Hour radio program from its inception to its conclusion in August, 1945, was designed and used, by the U. S. and Allied prisoners of war who conducted that program, to aid and comfort the U. S. by giving them true information as to the whereabouts and condition of prisoners of war taken by the Japanese, and by giving such information to injure Japan; that the defendant never wrote or composed any radio script whatever; that the defendant never made any news or propaganda

broadcast by radio or otherwise at any time; that defendant was kept under continuous surveillance by the Kempeitai and was in continuous fear of the Kempeitai and had good reason so to be; that defendant never committed any of the overt or other unlawful acts alleged in the indictment; and never wrote, said or broadcast any statement or committed any act whatever against the U. S. and its Allies or their cause or any statement in favor of the Japanese; to testify to the dates and hours of defendant's employment during said period and the days she was absent therefrom.

5. Mr. George Togasaki, Editor, Nippon Times, Tokyo, Japan, a Japanese citizen, to testify that ever since August, 1944, he has been acquainted with the defendant; that between August, 1944, to about March, 1945, he was manager of the Zero Hour radio program at Radio Tokyo; to state the names and addresses of each female who was an announcer or radio broadcaster on said program during said period of time and to testify to the nature, contents and character of their respective broadcasts; to testify to the names of the person or persons who prepared the script for said broadcasting and to the nature, contents and character thereof; the rates of compensation, if any, paid for such services; to testify to the time defendant there was engaged, the type of work or services she performed, the hours, days and months of her employment, the days she was absent therefrom; rate of compensation; to distinguish the work of the female

announcers on said program from the work performed by defendant; to testify that defendant never said, announced or broadcast by radio any propaganda whatever for the Japanese or anything against the U. S. or its Allies or against the U. S. and Allied cause and that she never committed any of the overt or other unlawful acts alleged in the indictment herein; that during her employment defendant was held under constant surveillance by the Japanese secret police and that the work she performed was not voluntary but was coerced.

6. Ruth Sumi Hayakawa; Tokyo, Japan, a Japanese citizen, to testify that she, Ruth Sumi Hayakawa, was employed for several years prior to 1943 continuously until about August, 1945, as a staff announcer for Radio Tokyo; that she became acquainted with the defendant about August, 1943; that in excess of twenty U. S. and Allied prisoners of war held by the Japanese were forced under duress to become radio announcers for the Japanese at Radio Tokyo; that certain of those prisoners were forced, under duress and in order to save their lives, to become broadcasters for the Japanese; that there were a number of female broadcasters on the Zero Hour program; to testify to the names of the persons who prepared the radio script for broadcasting on the Zero Hour program and to the names of the males and females who broadcast thereon and the nature and contents of those broadcasts, the frequency of those broadcasts and to distinguish their activities and duties of employment from those

of the defendant; to testify that the defendant never at any time whatever prepared or wrote any radio script and was not qualified so to do; to testify who originated that program, the purpose and objective thereof and that the prisoners of war who were compelled to broadcast designed and conducted the Zero Hour prisoner of war program to serve the U. S. and Allied military cause and to defeat the purposes of the Japanese by broadcasting U. S. and Allied prisoner of war messages to U. S. and Allied troops giving names, whereabouts and conditions of U. S. and Allied nationals taken prisoner by the Japanese; that the defendant was repeatedly registered with the Japanese police departments and was under their constant surveillance and by the Kempeitai; that the defendant never said or did anything or broadcast anything whatever favorable to the Japanese and never said or did anything or broadcast anything against the U. S. or its Allies or against the U. S. and Allied cause; and that defendant never committed any of the unlawful acts alleged in the indictment.

7. Mr. Ken Inouye, Care: GHQ., P. I. Office, Tokyo, Japan, a U. S. citizen, to testify that he has been personally acquainted with the defendant since about August, 1948; that from August, 1943, to August, 1945, he frequently visited Radio Tokyo, knew a majority of the radio announcers there employed; that he very frequently during said period visited said office and listened to the Zero Hour radio programs; to testify to the nature and

character of that program and to identify the announcers thereon and the nature and contents of the broadcasts of each male and female announcer he heard thereon and the nature and types of music recordings; and to testify to the nature of the occupation of defendant at Radio Tokyo, the days she there worked during said period and the days she was absent therefrom and the cause of such absences.

8. Mr. Kazuya Matsumiya, Tokyo, Japan, Seta-gaya-ku, a Japanese citizen, to testify that he was the principal of the "School of Japanese Language and Culture" in Shiba Ward Tokyo; that defendant enrolled in said school in September, 1941, and attended said school continuously from said date until about December 31, 1942, for the purpose of learning the Japanese language; that when she first enrolled she was ignorant of written Japanese and could not read the written language and had a scant ability to speak colloquial Japanese; and that she made a little progress in reading and writing that language; and to testify to the hours during the day and the days she attended said school.

9. Sr. Jose Filomino d'Aquino, of Atsugi, Kanagawa Prefecture, Japan, a Portuguese citizen, to testify that he has known the defendant since June, 1943, and that up to August 15, 1945, saw and conversed with her on an average once per month; that she repeatedly during said time expressed to him her loyalty, sympathy and devotion to the U. S. and Allied cause and her opposition to

Japan; that he knew of his own knowledge that defendant was kept in fear of the Kempeitai and that she was under constant surveillance by that organization and by the Tokyo metropolitan police departments; to testify to the fact that the defendant during said period suffered from malnutrition and beri beri; and to testify that he became the father-in-law of defendant on April 19, 1945, when his son married the defendant in Tokyo.

10. Sra. Maria d'Aquino, of Atsugi, Kanagawa Prefecture, Japan, a Portuguese citizen, to testify to the same facts as her husband, above stated, except the last clause thereof; and that she became the mother-in-law of defendant on April 19, 1945, when her son married the defendant in Tokyo.

11. Mr. Thaddeus d'Aquino, Care Portuguese Consulate, Hong Kong (and Shanghai), China, a Portuguese citizen, to testify that he has been acquainted with the defendant since about July, 1942; that during various conversations had with the defendant in Tokyo, Japan, from that time until the spring of 1944, the defendant spoke to him and told him of her loyalty to the U. S. and sympathy with the cause of the U. S. and its Allies and of her constant opposition to Japan on an average of two to three times per week; that by reason of the marriage of his brother Felipe J. d'Aquino to defendant on April 19, 1945, he became the brother-in-law of defendant.

12. Felipe J. d'Aquino, 396 Ikejiri Machi, Seta-gaya-Ku, Tokyo, Japan, a Portuguese citizen, to testify he married defendant on April 19, 1945; that he has known her since 1942; that he married her in Tokyo on April 19, 1945; that by virtue of said marriage and her registration of said marriage as a Portuguese citizen at the Portuguese Consulate in Tokyo, Japan, in 1945, she formally was naturalized as a Portuguese citizen and national; that from Nov., 1943, to Aug. 15, 1945, he saw the defendant almost daily; that defendant repeatedly told him she was loyal and devoted to the U. S. and Allied cause; that she many times during said period secretly and at great personal risk delivered food, medicine and blankets to U. S. and Allied prisoners of war held by the Japanese; that he saw her at Radio Tokyo many times during said period and knows the nature of her employment; that he knows of his own knowledge and observation that the defendant never wrote any radio scripts and that she never committed any of the unlawful acts charged in the indictment.

13. Mrs. Unami Kido, 396 Ikejiri Machi, Seta-gaya-Ku, Tokyo, Japan, a Japanese citizen, to testify she has been acquainted with the defendant since about October, 1944, to date; that the defendant rented two rooms from her since that time; that she saw and talked to defendant almost daily between then and August 15, 1945, that she knows of her own personal knowledge and observation that Japanese police agents and the Japanese secret police, the Kempeitai, maintained a constant surveil-

lance over defendant during said period and that defendant was in constant fear of them; that during said period of time defendant continually told her the United States would win the war against Japan and that she hoped the U. S. would win quickly; that she knows of her own knowledge and observed that the defendant would not contribute anything whatever to Japan or the Japanese people that in anywise could be deemed to aid it or them in any manner; that defendant refused to contribute old clothes to Japan; that she refused to make any voluntary money contributions to Japan; that the defendant would not voluntarily cooperate with any request of the Japanese authorities, neighborhood associations or organizations; that defendant refused to attend fire drills and public meetings; that Japanese police agents questioned this witness repeatedly about the activities of the defendant, about what the defendant did, her visits, who she visited, who visited her and what the substance of her conversations with other persons were; that neighbors and police agents termed the defendant as a spy against Japan and held her up to public hatred; that defendant kept her constantly informed during said period of time of the progress of the U. S. and Allied troops and told her that anything she read in the Japanese papers or heard on the radio to the contrary was nothing but false Japanese propaganda; that she knows of her own personal knowledge and observation that the defendant took food to U. S. and Allied prisoners of

war held by the Japanese despite the fact that she risked her own personal security in so doing.

14. Miss or Mrs. Yoneko Matsunaga, Tokyo, Japan, a Japanese citizen, to testify that from about August, 1944, to August, 1945, she was engaged as a radio announcer at Radio Tokyo; that she had been acquainted with the defendant since August, 1944, that her voice is almost identical in timbre, tonal quality and frequency range as that of the defendant and that she knows this fact to be true of her own knowledge by virtue of tests made thereon and that her voice frequently during said period of time has been confused with and been mistaken for that of the defendant; that she knows of her own knowledge and observation that the defendant never wrote any radio script and that defendant was not competent to write such script; that defendant never broadcast any news, news commentaries or propaganda for the Japanese; that defendant never committed any of the acts and things alleged in the indictment.

15. Charles Yoshii, Tokyo, Japan, a Japanese citizen, to testify that he was employed at Radio Tokyo during 1943 to August, 1945; that he has been acquainted with the defendant since about August, 1943; to testify to the nature, time, hour, and character of the Zero Hour radio program during said period; the names of the persons participating therein, including the males and females and the nature, extent and character of the participation of each; that the defendant never wrote or

composed any radio script of any character whatever and had neither the training nor the ability to write radio script; the nature, character, extent and time and duties of defendant's employment; that defendant never broadcast or uttered any statement or did any of the unlawful things charged in the indictment and that *the* never broadcast any news, news commentaries or propaganda for the Japanese and never uttered any statement or broadcast any statement derogatory to the U. S. and its allies or to the U. S. and allied cause and never uttered any statement or broadcast any statement in anywise favorable to Japan or its war effort.

16. Miss Foumy Saisho, Nippon Times, Tokyo, Japan, a Japanese citizen, to testify that she was a translator for Radio Tokyo from early 1943 to Aug., 1945; that she has been acquainted with the defendant since August, 1943; that she is acquainted with all the U. S. and Allied prisoners of war who were coerced into broadcasting for the Japanese at Radio Tokyo during that time; to state the names of each and every male and female who broadcast on the Zero Hour program, the nature, contents and character of their broadcasts and to distinguish the activities and employments of each of those females from the defendant; to testify that the defendant never wrote or composed any radio script and that she was not qualified so to do; that the defendant never ad libbed on the radio and that she never broadcast any news or propaganda for the Japanese or any matter of thing that was favor-

able to the Japanese or against the United States and its Allies; that the defendant never did anything whatever to help Japan; that in conversations with the defendant during said period of time the defendant stated to her that she was opposed to Japan.

17. Mr. Hisashi Moriyama, Tokyo, Japan, a Japanese citizen, and now a band leader in Tokyo; to testify that he has been acquainted with the defendant since about June, 1944; that he was employed at Radio Tokyo at that time and until August 15, 1945; that he was acquainted with the writers and composers of the radio script used on the Zero Hour program; that the defendant never wrote or composed any of that script or any other radio script; that he knows the nature, contents and character of all the radio script used on that program and to testify thereto; that he was acquainted with each of the females who broadcast on that program and the nature and contents of their broadcasts and the duties they performed; that the defendant never made any news or propaganda broadcasts for the Japanese and never broadcast anything detrimental to or against the United States and its Allies.

18. Mr. Katsuo Okada, Tokyo, Japan, a Japanese citizen, to testify that he has been acquainted with the defendant since about October, 1944, and that he conversed with her on an average of once per week from then until August 15, 1945, in Tokyo, Japan; that the defendant on practically each of

those occasions told him Japan would lose the war, that anything he read in Japanese newspapers to the contrary was false propaganda; that she repeatedly told him of U. S. and Allied successes in the war; that the defendant at all times was loyal to the United States and its Allies and opposed to Japan.

19. Mr. Mugio Hattori, Tokyo, Japan, a Japanese citizen, to testify that he visited the defendant in Tokyo approximately once per month from July, 1941, to Dec. 8, 1941, and thereafter seven or eight times in 1944, and up to August 15, 1945; that she repeatedly informed him she was loyal to the United States and its Allies and opposed to Japan, that the United States would defeat Japan, that Japan was the cause of the war and informed him that Japanese reports of Japan's successes in the war were false; that the United States and the Allies were gaining and would win the war and that she hoped the U. S. would win the war quickly; that he repeatedly informed the defendant that she should not talk too much against Japan or she would be jailed.

20. Mr. George Nakamoto, Tokyo, Japan, a Japanese citizen, to testify that he has been acquainted with the defendant since about November 1, 1943; that he formerly was in charge of the Zero Hour program at Radio Tokyo from November, 1943, to the fall of 1945; that sometime about November, 1943, he brought and delivered to Radio Tokyo an order or command from the Japanese

Army headquarters to Mr. Takano, then manager of the business office of Radio Tokyo, ordering him to force the defendant to take a radio voice test; to testify to the purpose of said test and the contents of said order and the maker of said order; that said Takano coerced defendant into such a test, and that defendant took the test under duress and over her protests; to testify to the names of the males and females who conducted the Zero Hour radio program; how that program originated, and its purpose, and that the U. S. and Allied prisoners of war who were coerced into broadcasting by the Japanese authorities converted the Zero Hour program into a program designed and utilized to aid the cause of the Allies by bolstering up the morale of U. S. and Allied troops by playing lively American and European music and broadcasting messages of U. S. and Allied prisoners of war; to testify to the nature and duties of defendant's occupation during said period of time, the nature and character of her employment, the hours and days she worked and her absences therefrom; that defendant never wrote or composed any radio script; that defendant never did anything and never broadcast anything disloyal to the United States or its Allies; that the defendant was kept under close surveillance by the Kempeitai and metropolitan police; that the defendant was loyal to the cause of the U. S. and its Allies and opposed to Japan.

21. Douglas MacArthur, Supreme Commander Allied Powers, and General, U. S. Army, G. H. Q.,

Tokyo, Japan, an American citizen, or his nominee, to testify whether or not he or any military officer under his command ordered or authorized the seizure of the defendant by U. S. troops on or about September 5, 1945, and their detention and questioning of her on said date and on September 6, 1945, at the Yokohama New Grand Hotel in Yokohama, Japan, and, if so, under what authority or process; and also to testify whether or not any written authority or process issued for such purposes and, if so, the nature and contents thereof and to have the same read into evidence in this proceeding;

And also to testify whether or not he, or any military officer under his command, ordered or authorized the arrest of the defendant by U. S. troops on or about October 17, 1945, at her home at No. 396 Ikejiri Machi, Setagaya-Ku, Tokyo, Japan, her imprisonment from said date to November 16, 1945, in the Yokohama Prison, Yokohama, Japan, and thereafter from November 16, 1945, to October 25, 1946, in the Sugamo Prison, Tokyo, Japan, on which latter date she was released and restored to her liberty, and, if so, under what authority or process was said arrest made, said imprisonment inflicted upon her and her said release made, and also whether or not said arrest was made upon any charge or charges preferred against her and, if so, by whom and what was the nature and contents thereof; whether or not she was given any hearing or trial on any such charge or charges

and, if so, when and before what tribunal; and to testify to what sentence or punishment was meted out to her and upon what authority; and to produce or have produced and read into evidence in this proceeding the records relating to the defendant's said arrests, the charges preferred against her, if any, the hearings or trial of defendant and sentence or punishment imposed upon her, the said two imprisonments and the releases of defendant from said imprisonments.

22. Major General Charles Willoughby, U. S. Army, Chief of the Counter Intelligence Corps, U. S. Army, GHQ., Tokyo, Japan, an American citizen, or his nominee, to testify to the same facts hereinabove set forth as being the testimony defendant expects from General Douglas MacArthur, U. S. Army, and to produce such records and read them into evidence herein.

23. U. S. Army Officer in Charge of Sugamo Prison, Tokyo, Japan, an American citizen, to testify to the facts and records concerning the imprisonment of the defendant in said prison from on or about November 16, 1945, to October 25, 1946; the authority for said imprisonment and release therefrom on October 25, 1946, the charges, if any, preferred against her, the name of her accuser, if any, whether or not she was accorded a hearing or trial thereon and, if so, by whom and under what authority; the process or authority under which she there was confined for said period of time; the nature and circumstances of her release from said

imprisonment; and to produce the official records of said prison relating to said incarceration and release of the defendant and to read them into evidence in this proceeding;

And also to testify to the facts and records relating to the confinement of defendant in said prison from on or about August 26, 1948, to September 3, 1948; the authority and process, if any, for said confinement, and to read said records into evidence in this proceeding.

And the same officer, if he is in charge of the Yokohama Prison records from Oct. 17, 1948, to Nov. 15, 1948, to testify to the facts covered in Paragraph 22 hereof.

24. U. S. Army Officer in Charge of Yokohama Prison, Yokohama, Japan, a U. S. citizen, to testify to the records of said prison concerning the incarceration of the defendant there from on or about October 17, 1945, to on or about November 16, 1945; to testify on what authority she was so incarcerated for said period of time, to testify whether or not any formal written or oral charges were preferred against her or any accusation made against her out of which said incarceration and commitment arose; the nature and contents of any such charge or accusation; who or what authority preferred such charge against her; to testify whether or not defendant was accorded any hearing or trial out of which said commitment and imprisonment arose; and to produce the official records of said prison relating to

said incarceration and commitment of the defendant and to read them into evidence in this proceeding.

25. Father Desmoulins, Sophia University Chapel, Tokyo, Japan, a citizen of France, to testify that the defendant studied Catholicism and received religious instruction from the Catholic priesthood at Sophia University Chapel from February, 1945, to the end of April, 1945; the days and hours defendant there attended, and the time and place defendant was married to Felipe J. d'Aquino, a Portuguese national and citizen.

26. Dr. Y. Amano, near Camp Drake, Tokyo, Japan, a Japanese citizen, to testify he was defendant's attending physician from July 1, 1941, to August, 1945; to testify to defendant's medical history during said period of time and to her mental and physical condition; to show that defendant suffered from beri beri and malnutrition in 1943, and otitis media in 1944; to the loss of defendant's baby in 1948; to conversations with her in 1943 to Aug., 1945, in which she informed him that Japan was in the wrong in starting the war and that Japan would be defeated and that the U. S. would win; that she was loyal and devoted to the U. S. and Allied cause and was opposed to Japan; that she informed him that newspaper and radio reports *be* heard of Japanese war successes were false and that the truth was that the U. S. and its Allies were advancing successfully and would soon defeat

Japan and that she hoped for a quick U. S. victory over Japan.

27. Dr. Fumi Amano, a Japanese citizen, wife of Dr. Y. Amano, at his address, to testify to the same facts above outlined as to Dr. Y. Amano.

28. Mrs. Miyeko Oki, nee Furuya, Tokyo, Japan, a Japanese citizen, to testify she has been acquainted with the defendant since about March, 1944, that she was employed during November, 1943, and to August 15, 1945, at Radio Tokyo, where she saw and talked to defendant several times per week; that the defendant never wrote or composed any radio script and that she never broadcast anything disloyal to the United States or anything to aid the war efforts of Japan and that she never committed any of the unlawful acts charged or referred to in the indictment.

29. Mr. Ken Oki, Tokyo, Japan, a Japanese citizen, to testify that he was assistant manager of the Zero Hour radio program at Radio Tokyo, Japan, from about November 1, 1943, to the fall of 1944 when he became manager thereof until about August 15, 1945; that he has been acquainted with the defendant since about November 1, 1943; to testify to the names of the males and females who broadcast on the Zero Hour program and to the nature, contents and character of each of their radio announcements; to testify to the nature and character of defendant's employment at Radio Tokyo, the hours and days she was present and

the days she was absent, the compensation she received therefor; that the defendant never wrote or composed any radio script whatever and that she was not able so to do; that the defendant never broadcast or uttered any statement against the United States or its Allies or against the interests of the U. S. or its Allies; that she was loyal and sympathetic to the U. S. and Allied cause; that she never committed any of the unlawful acts alleged in the indictment.

30. K. Uno, Tokyo, Japan, a Japanese citizen, to testify that he was frequently at Radio Tokyo, Tokyo, Japan, from November, 1943, to about February, 1945; that he was acquainted with the defendant during said period of time; that he knows of his own knowledge and observation that the defendant never wrote any radio script and never said, uttered or broadcast any statement or statements against the U. S. and its Allies or against the U. S. and Allied cause; that she never committed any of the unlawful acts specified or referred to in the indictment; that the defendant was compelled to accept her employment at Radio Tokyo under duress and that she protested against her said employment but was coerced into it by Mr. Takano, manager of the business office of Radio Tokyo, on or about November, 1943.

31. Mr. Ken Ishii, Tokyo, Japan, a Japanese citizen, to testify that he was employed at Radio Tokyo, Japan, in 1944; that he has been acquainted with the defendant since about January, 1944; what

while he was so employed he knows of his own knowledge and observation that the defendant neither wrote nor composed any radio script and that she did not broadcast or do any of the unlawful acts alleged in the indictment.

32. Miss Mary Ishii, Tokyo, Japan, a British citizen, sister of said Ken Ishii, to testify she was employed at Radio Tokyo, Japan, from about February, 1945, to about August 15, 1945; that she has been acquainted with the defendant from about February, 1945; that she saw the defendant almost daily from then to August 15, 1945, and very frequently talked to her; that the defendant never wrote or composed any radio script and never said, uttered or broadcast any news or propaganda for the Japanese.

33. Chief of Police, Setagaya Ward, Tokyo, Japan, a Japanese citizen, to testify that the records of his department show several registrations thereby by the defendant; to testify to the facts of said registrations from the original records thereof and to read the written registrations into evidence; to testify to the purpose for which said registrations were made and under what authority they were required to be made; and to testify that said police department from July, 1941, to August, 1945, investigated the defendant, her activities and movements and kept her under constant surveillance and to testify to the purpose and reasons therefor and to testify that the defendant was regarded as being

dangerous to the security of Japan and as a spy for the U. S., and to produce and read said records into evidence in this action.

34. Chief of Police, Shiba Ward, Tokyo, Japan, a Japanese citizen, to testify that the records of his department show several registrations thereby by the defendant; to testify to the facts of said registrations from the original records thereof and to read the written registrations into evidence; to testify to the purpose for which said registrations were made and under what authority they were required to be made; and to testify that said police department from July, 1941, to August, 1945, investigated the defendant, her activities and movements and kept her under constant surveillance and to testify to the purpose and reasons therefor and to testify that the defendant was regarded as being dangerous to the security of Japan and as a spy for the U. S., and to produce and read said records into evidence in this action.

35. Chief of Police, Atsugi, Japan, a Japanese citizen, to testify that the records of his department show several registrations thereby by the defendant; to testify to the facts of said registrations from the original records thereof and to read the written registrations into evidence; to testify to the purpose for which said registrations were made and under what authority they were required to be made; and to testify that said police department from July, 1941, to August, 1945, investigated the defendant, her activities and movements and kept her under

constant surveillance and to testify to the purpose and reasons therefor and to testify that the defendant was regarded as being dangerous to the security of Japan and as a spy for the U. S., and to produce and read said records into evidence in this action.

36. Chief of Metropolitan Police, Tokyo, Japan, a Japanese citizen, to testify that the records of his department show several registrations thereof by the defendant; to testify to the facts of said registrations from the original records thereof and to read the written registrations into evidence; to testify to the purpose for which said registrations were made and under what authority they were required to be made; and to testify that said police department from July, 1941, to August, 1945, investigated the defendant, her activities and movements and kept her under constant surveillance and to testify to the purpose and reasons therefor and to testify that the defendant was regarded as being dangerous to the security of Japan and as a spy for the U. S., and to produce and read said records into evidence in this action.

37. Officer in Charge of the records of the Kempeitai, Tokyo, Japan, either a U. S. or a Japanese citizen, to testify that the records of the Kempeitai show that the Kempeitai constantly investigated the history, activities and movements of the defendant from July, 1941, to August, 1945, and that it regarded the defendant as being a person dangerous to the security of Japan and as being a spy

for the United States and kept her under continuous surveillance during said period of time, and to produce and read said records into evidence in this action.

38. Mr. Hanamaki Tazaki, Tokyo, Japan, a Japanese citizen, to testify that he was a liaison agent between Japanese Army Headquarters and Radio Tokyo between Aug., 1943, and Aug., 1945; that, as such he was familiar with and knew the person or persons who originated and conducted the Zero Hour radio programs; to testify to the persons, male and female, who broadcast on that program, the nature, contents and character of those broadcasts during the life of said program; that said program was utilized by the U. S. and Allied prisoners of war who broadcast thereon as an instrument to serve the U. S. and Allied cause by broadcasting lively American and European musical records and reading messages of U. S. and Allied prisoners of war held by the Japanese so that the U. S. and Allied military authorities would learn that they survived death and learn of their whereabouts and that their relatives' morale would be boosted by learning they were alive.

39. Charles C. Cousens, 7 Bapaune Road, Mosman, Sydney, N.S.W., Australia, a citizen of Great Britain, to testify that he was a Major in the Australian Army held as a prisoner of war by the Japanese in Tokyo from early 1943 to Aug. 15, 1945; that he and some twenty-five (25) other U. S.

and Allied military and civilian personnel held as prisoners of war by the Japanese at Bunka Prison in Tokyo Bay, Tokyo, Japan, under duress and threats against their lives were coerced into acting as radio announcers and broadcasters at Radio Tokyo, Japan; that he and other prisoners of war so held under duress originated the Zero Hour program on or about November, 1943, which was a regular program thereon until Aug., 1945; that said program was designed and used by said prisoners of war for the purpose of aiding the U. S. and Allied cause and so was used during the whole of said period of time; that the music recordings broadcast over that program were of classical, semi-classical and popular American and European types of music of lively and familiar types they selected for the purpose of bolstering up the morale of U. S. and Allied troops who picked up the same in receivers and especially was this so because the troops had no other source of such music available to them; that the program was otherwise devoted to the broadcasting of messages from U. S. and Allied prisoners of war held by the Japanese to U. S. and Allied troops and civilians so that U. S. military authorities would learn of their survival and whereabouts and the morale of their relatives at the front and at home be heightened by the news of their survival; that Mr. Takano, acting on Japanese Army orders compelled the defendant, under duress and over her protests, to have a test made

of her voice at Radio Tokyo; that defendant was compelled to accept the employment designated for her by the Japanese authorities and accepted her employment under duress and over her repeated protests; that the defendant never wrote or composed any radio script; that she never broadcast any news, news commentaries or propaganda for the Japanese and never served the interests of Japan; that she never said, uttered or broadcast any statement or statements derogatory to or against the U. S. or its Allies or against the U. S. and Allied cause; that the defendant never committed any of the unlawful acts alleged or referred to in the indictment; that he talked to the defendant almost daily from about November, 1943, to about June, 1944, and almost daily the defendant stated she was hoping the U. S. and its Allies would soon defeat the Japanese and that the U. S. would defeat Japan, that she was loyal to the U. S. and its Allies and the U. S. and Allied cause; that the defendant at risk of great personal danger to herself secretly conveyed food, medicine and clothing to prisoners of war in need thereof; that the defendant was constantly under surveillance by the Kempeitai and metropolitan police.

40. John Holland, Hong Kong, China, a British citizen, to testify that he was a prisoner of war held by the Japanese in Tokyo in 1943 to 1945; that he has been acquainted with the defendant since about November, 1943; that he was present at the

time and place Mr. Takano, then manager of the business office of Radio Tokyo, decided to order the defendant to accept the employment he and others had selected her for without her knowledge; that when informed thereof by Mr. Takano the defendant protested acceptance thereof and that thereupon Mr. Takano threatened her and thereafter, she, under duress and over her protests was compelled to comply; that the defendant never wrote any radio script; that she never committed any of the unlawful acts charged or referred to in the indictment.

41. The General Manager, a Japanese citizen, or subordinate officer under him having charge of the records of employment and compensation paid employees, of Radio Tokyo, Tokyo, Japan, to produce and to testify from and to read into evidence the records of said company showing the period of time the defendant was employed by said company, from 1943 to Aug., 1945, the days and hours she worked there, the capacity in which she worked, the days she absented herself therefrom; the rates of pay she received therefor; the time cards filled out by her and the original employment checks she received during said time.

42. Mr. Hifumi, a Japanese citizen, whose first name is unknown to affiant, but who was a Major in the Japanese Army in 1943 to 1945 and a friend of the above-mentioned Hanamaki Tazaki, and may

be located through him, to testify to the same facts defendant expects to elicit as testimony of said Hanamaki Tazaki.

43. Mr. Takabataki, a Japanese citizen, whose first name is unknown to affiant, but who was employed in the Japanese Foreign Office, to testify to the same facts defendant expects to elicit as testimony of said Hanamaki Tazaki.

Affiant is informed and believes and therefore alleges on such information and belief that each of the foregoing named witnesses, together with other witnesses in Japan who may be found to be necessary and material witnesses for the defendant, is ready, willing and able to come to San Francisco, California, to testify in person on behalf of the defendant at the trial herein provided his or her travel and subsistence expenses and witness fees will be defrayed, or to have his or her testimony taken by deposition abroad at his or her place of residence.

Affiant alleges that the failure or refusal of the Court to authorize the production of the said witnesses from abroad to testify in person for the defendant at the trial or the failure of the Government to authorize them to be produced for said purposes at the expense of the Government will result in a failure of justice and deprive her of a fair and impartial trial and of the right of obtain witnesses in her favor and of the due process of law guar-

anted her by the provisions of the Sixth and Fifth Amendments of the U. S. Constitution.

/s/ IVA IKUKO TOGURI
D'AQUINO,
Affiant.

Subscribed and sworn to before me this 1st day of March, 1949.

[Seal] /s/ C. W. CALBREATH,
Clerk, U. S. District Court, Northern District of California.

Receipt of copy acknowledged.

[Endorsed]: Filed March 1, 1949.

District Court of the United States, Northern
District of California, Southern Division

At A Stated Term of the District Court of the United States for the Northern District of California, Southern Division, held at the Court Room thereof, in the City and County of San Francisco, on Monday, the 14th day of March, in the year of our Lord one thousand nine hundred and forty-nine.

Present: The Honorable Michael J. Roche,
District Judge.

[Title of Cause.]

ORDER

(Minute order that motion to take certain depositions be granted and that remaining motions be denied.)

This case came on for hearing of motion for subpoena, motion to take depositions. Defendant was present in custody of U.S. Marshal and with her attorney, Wayne Collins, Esq., Hon. Frank J. Hennessy, U. S. Atty., for U.S. After hearing the arguments of the attorneys, it is Ordered that said motion to take certain depositions be granted; and that the remaining motions be denied, in accordance with a signed order this day filed. Ordered defendant remanded to custody of U.S. Marshal.

[Title of District Court and Cause.]

Order Denying Seven Motions and Granting Defendant's Motion For Taking Depositions Abroad and Authorizing Expense Thereof and Travel and Subsistence Expenses of Defendant's Attorney For Attendance At Such Examinations

The eight consecutive motions of the defendant filed herein on March 1, 1949, coming on regularly to be heard the 14th day of March, 1949, Wayne M. Collins, Esq., appearing for the defendant and orally arguing in favor of the grant of each of said motions and Frank J. Hennessy, U.S. Attorney appearing for the plaintiff and arguing in opposition thereto, and the matter thereupon being submitted to the Court for decision and the matter being duly considered by the Court,

It Is Ordered, as follows:

(1) That defendant's Motion No. I entitled "Motion For Order Authorizing And Directing Issuance of Subpoenas Requiring Attendance of Witnesses In A Foreign Country At The Trial Herein At The Expense Of The Government And For Service Thereof" be and the same hereby is denied;

(2) That defendant's Motion No. II entitled "Motion To Dismiss The Indictment" be and the same hereby is denied;

(3) That defendant's Motion No. III entitled "Motion That Court Conduct Part of Trial By Jury In Tokyo, Japan, Hong Kong, China, and Sydney, Australia," be and the same hereby is denied.

(4) That defendant's Motion No. IV entitled "Motion To Dismiss The Indictment," be and the same hereby is denied.

(5) That defendant's Motion No. V entitled "Motion To Postpone Trial Of The Cause And Either To Discharge Defendant From Custody Or To Admit Her To Bail Pending Such Time As The Government Provides For The Production Of Defendant's Witnesses From Abroad To Testify In Person At The Trial Herein," be and the same hereby is denied.

(6) That defendant's Motion No. VI entitled "Motion To Dismiss The Indictment," be and the same hereby is denied.

(7) However, as to Motion No. VII entitled "Motion For Order Authorizing And Directing Issuance Of Subpoenas Requiring Attendance Of Witnesses Abroad At The Taking Of Their Depositions And Providing For The Taking Of Depositions Of Foreigners and Citizens Abroad, At The Expense Of The Government, Including The Expenses Of Travel And Subsistence Of Defendant's Attorney And Investigator-Interpreter For Interviewing Witnesses And For Attendance At The Examinations," the Court finds that the defendant is indigent and does not have sufficient means and is actually unable to pay the fees of her witnesses for her defense and cannot bear the expense of the taking of the depositions of her witnesses in Japan and Hong Kong; that the witnesses named in her motion and affidavit in support thereof are material and necessary witnesses for her and that their testimony and evidence is necessary and material for her defense at the trial of the cause; that she cannot safely proceed to trial of said action without the testimony of said witnesses and the production of the documentary evidence mentioned in said affidavit; that she cannot bear the expenses of travel and subsistence of her attorney for attendance at the said examinations, that is, at the taking of said depositions, and that the plaintiff consents that the depositions of defendant's witnesses in Japan and Hong Kong there may be taken before any person, at any time or place, upon any notice, and in any manner, commencing on or about April 3, 1949, and continuing thereafter daily until completed, as coun-

sel for the respective parties, or their associates or representative attorneys there shall agree, and counsel for the parties having informed the Court they will execute and file herein a written stipulation thereto within a reasonable time, and the Court finding and concluding that the failure or refusal of the Court to order or authorize the taking of said depositions at the expense of the United States Government and the payment of her counsel's travel and subsistence expenses to attend the taking of said depositions at the expense of the United States Government would deprive the defendant of substantial rights and would result in a failure of justice and that, therefore, defendant's said Motion No. VII should be granted, save and except her request for travel and subsistence expenses for an investigator-interpreter to accompany her counsel to assist him in locating witnesses, obtaining their statements and acting as interpreter and translator for him from English into Japanese and Japanese into English in connection therewith which is denied,

Wherefore It Is Ordered as follows:

(a) That the oral depositions of each of the witnesses for the defendant named in said motion, or such of them as the defendant or her counsel may deem necessary, together with the oral depositions of such other witnesses for the defendant as her counsel may wish to take in Japan and Hong Kong there shall be taken before any person, at any time or place, upon any notice, and in any manner,

commencing on or about April 3, 1949, and continuing thereafter daily until completed in Japan and Hong Kong, as counsel for the defendant and counsel for the plaintiff, or their associate or representative attorneys there shall agree upon;

(b) That the expense of the taking of said depositions, estimated not to exceed the sum of Three Thousand (\$3,000.00) Dollars, shall be paid by the United States Government.

(c) That the expenses of travel, estimated not to exceed the sum of One Thousand Eight Hundred (\$1,800.00) Dollars, together with subsistence expenses of Ten Dollars per day for a period of time estimated not to exceed Forty Five (45) days, amounting in the aggregate to a sum estimated not to exceed Four Hundred Fifty (\$450.00) Dollars, of the defendant's attorney, Theodore Tamba, Esq., associated with Wayne M. Collins, Esq., for attending said examinations, that is, the taking of said depositions, shall be paid by the United States Government.

(8) That defendant's Motion No. VIII entitled "Motion To Dismiss Indictment" be and the same hereby is denied.

Dated: March 15th, 1949.

/s/ MICHAEL J. ROCHE,

United States District Judge.

Receipt of a copy of the above Order is hereby admitted this 15th day of March, 1949.

/s/ FRANK J. HENNESSY,

U. S. Attorney.

29 SF WA/CT-AO/ PBA

1949 Mar 23 p.m. 3:06

Teletype Division

Washington 3-23-49 506P

C. W. Calbreath, Clerk U.S. District Court SF

Re case Tokyo Rose, defendant's attorney Theodore Tamba authorized by court to travel to Japan and Hong Kong please deliver to him from your book necessary government transportation requests signed by you as issuing officer covering travel in accordance with court order of March 15, 1949.

ELMORE WHITEHURST.

15 1949

RVS 514P

San Francisco, Calif.

March 25, 1949.

Received from C. W. Calbreath, Clerk U.S. District Court, Government Travel request USca 30578 for air transportation from San Francisco, California to Hong Kong, China and return, in the sum of \$1,306.80.

/s/ THEODORE TAMBA.

[Endorsed]: Filed March 15, 1949.

[Title of District Court and Cause.]

STIPULATION TO TAKING ORAL
DESIGNATIONS ABROAD

It is stipulated between the parties hereto that the oral depositions of each and all of the defendant's witnesses mentioned in her motion for the production of said witnesses at the trial herein and for the taking of their depositions, which motions were filed herein on March 1, 1949, together with the oral depositions of any other witnesses who reside abroad in Japan, or Hong Kong, China, who hereafter may be designated by the defendant or her attorney, Wayne M. Collins, or his associate, Theodore Tamba, Esq., as such a witness, may be taken before any consular officer of the United States in Japan or Hong Kong, China, or before any other person or persons to be mutually decided on between the respective attorneys for the parties hereto while they are in Japan or Hong Kong for said purpose commencing on or about April 3, 1949, and continuing thereafter until completed, and that such be taken in any manner upon which they there may agree, provided however, that all objections of each of the parties hereto, including objections to the form of the questions propounded to witnesses, and to relevancy, materiality and competency thereof, and the defendant's objections to the use of the depositions or any part of the depositions

by the plaintiff on the plaintiff's case in chief, shall be reserved to the time of trial herein.

Dated: March 17, 1949.

/s/ WAYNE M. COLLINS,
Attorney for Defendant.

/s/ FRANK J. HENNESSY,
U.S. Attorney.

/s/ TOM DeWOLFE,
Sp. Asst. to the Attorney
General.

So Ordered: March 22nd, 1949.

/s/ MICHAEL J. ROCHE,
United States District Judge.

[Endorsed]: Filed March 22, 1949.

[Title of District Court and Cause.]

NOTICE

To Frank J. Hennessy, United States Attorney, and
To Tom DeWolfe, Special Assistant to the At-
torney General, Attorneys for the Plaintiff:

You and each of you will please take notice that on Monday, the 11th day of April, 1949, at the Courtroom of the above-entitled Court, 3rd Floor, Post Office Building, 7th and Mission Streets, San Francisco, California, at the hour of 10 o'clock A. M. of said day, or so soon thereafter as counsel can be heard, the defendant will bring on for hearing the within motion.

Dated: April 5, 1949.

/s/ WAYNE M. COLLINS,
Attorney for Defendant.

[Title of District Court and Cause.]

MOTION FOR LISTS OF WITNESSES AND VENIREMEN

The defendant moves this Court, under Title 18 USCA, Sec. 3432, (formerly Sec. 562), for the order of this Court forthwith requiring the plaintiff or its counsel to supply the defendant with a list of the names of the witnesses to be produced on the trial for proving the indictment herein together with a statement giving the place of abode of each such witness and also for its order requiring the plaintiff or its counsel to supply the defendant at least three entire days before the trial with a list of the veniremen stating the abode of each venireman.

/s/ WAYNE M. COLLINS,
Attorney for Defendant.

Points and Authorities In Support Of Motion

Title 18 USCA, Sec. 3432 (formerly Sec. 562) reads as follows:

“A person charged with treason or other capital offense shall at least three entire days before commencement of trial be furnished with a copy of the indictment and a list of the veniremen, and of the witnesses to be produced on the trial for proving the indictment, stating the place of abode of each venireman and witness.”

The provision is mandatory. See *Logan v. U. S.* 144 U. S. 263, 304, and *McNabb v. U. S.* (CCA-Tenn), 123 Fed. 2d. 848, 853, rev. on other grounds, 318 U. S. 332. The purpose of the statute is to enable a defendant to investigate the jurors and the witnesses.

Inasmuch as the majority of the plaintiff's witnesses who appeared for the plaintiff for grand jury purposes appear to have been brought by the Government from Japan and elsewhere outside the geographical jurisdiction of this Court it is to be presumed such witnesses, and others, will be produced as plaintiff's witnesses at the trial herein. Inasmuch as said witnesses are outside this judicial district and their names and places of abode have not been revealed to the defendant it will take defendant's counsel more than three days preceding the commencement of the trial to conduct an investigation of such witnesses abroad and outside the jurisdiction of this court.

Respectfully submitted,

/s/ WAYNE M. COLLINS,

Attorney for Defendant.

Receipt of copy acknowledged.

[Endorsed]: Filed April 5, 1949.

[Title of District Court and Cause.]

NOTICE

To Frank J. Hennessy, United States Attorney, and
To Tom DeWolfe, Special Assistant To the
Attorney General, Attorneys For the Plaintiff:

You and each of you will please take notice that on Monday, the 11th day of April, 1949, at the Courtroom of the above-entitled Court, 3rd Floor, Post Office Building, 7th and Mission Streets, San Francisco, California, at the hour of 10 o'clock A. M. of said day, or so soon thereafter as counsel can be heard, the defendant will bring on for hearing the within motion.

Dated: April 5, 1949.

/s/ WAYNE M. COLLINS,
Attorney for Defendant.

[Title of District Court and Cause.]

I.

MOTION FOR ORDER AUTHORIZING AND
DIRECTING ISSUANCE OF SERVICE OF
SUBPOENAS REQUIRING ATTEND-
ANCE OF WITNESSES AT THE TRIAL
HEREIN AT THE EXPENSE OF THE
GOVERNMENT

The defendant, Iva Ikuko Toguri d'Aquino, moves the Court for its order authorizing and directing the issuance and service of subpoenas requiring the

attendance of the hereinafter named witnesses, residing at the places hereinafter set forth, at the trial herein at the expense of the plaintiff, the U. S. Government.

The names, addresses and places of residence of the said witnesses are as follows:

1. George H. Henshaw, 2025 Benedict Canyon Drive, Beverly Hills, California.

2. Chiyeko Ito, 3118 Blanchard Street, Los Angeles 33, California.

3. Amy Masuda, Los Angeles, California.

4. James F. Whitten, Torrance, Los Angeles County, California.

5. Martin Pray, 962 Ackerman Avenue, Syracuse 10, New York State.

6. May E. Hagedorn, 4211 Olive Drive, Everett, Washington.

7. Norman Reyes, 1611 Eastland Avenue, Nashville, Tenn.

8. Mrs. Norman Reyes, 1611 Eastland Avenue, Nashville, Tenn.

9. John E. Tunncliffe, Route 4, Box 233, Grants Pass, Oregon.

10. Mark L. Streeter, 1008 Cassia Street, Idaho Falls, Idaho.

11. John David Provo, Address is believed to be at a U. S. military camp in Texas or Maryland.

12. Major Wallace E. Ince, Presidio, San Francisco, California.

This motion is made upon the ground that each of the named witnesses is a necessary and material witness for the defendant on the trial of said action and a witness whose testimony is necessary and material to the defendant in her defense to said action.

The facts to which each of the said witnesses is expected to testify and the materiality of that testimony is set forth in the affidavit of the defendant filed in support of this motion which is incorporated herein by reference for said purpose.

The defendant cannot safely proceed to trial of said action without the production of the person of each of said witnesses in court at the trial herein to testify in person so that the individual testimony, attitude and demeanor of each can be observed, considered and weighed by the Court and the jury.

This motion is also made upon the ground that the defendant is an indigent person and does not have sufficient means and is actually unable to pay the fees for the issuance and service of said subpoenas for said witnesses and is actually unable to pay the costs of transportation of said witnesses to attend the said trial of the action. Each of said witnesses is ready, willing and able to attend the trial and testify on behalf of the defendant in the event he or she is served with a subpoena and is paid the necessary witness fees and transportation expenses.

The failure or refusal of the Court to order or authorize the issuance and service of said subpoenas

and the production of said witnesses at the trial herein at the expense of the Government will result in a failure of justice and deprive the defendant of her substantial constitutional and statutory rights to a fair and impartial trial by jury and to obtain witnesses in her favor, in violation of the provisions of the Sixth Amendment and the due process of law guaranty of the Fifth Amendment of the Constitution.

This motion will be made and based upon the notice of this motion, said motion, affidavit in support thereof, and upon all the records, pleadings, files, court orders and documents herein, and upon the similar motion heretofore made herein for like service of subpoenas and for the taking of depositions filed herein on March 1, 1949.

/s/ WAYNE M. COLLINS,
Attorney for Defendant.

Points and Authorities

Rules 17 and 26, Rules of Criminal Procedure.

Fifth Amendment, U. S. Constitution.

Sixth Amendment, U. S. Constitution.

Title 18 USCA, Sec. 3005.

Respectfully submitted,
/s/ WAYNE M. COLLINS,
Attorney for Defendant.

Affidavit In Support Of Motion

Northern District of California,
State of California,
City and County of San Francisco—ss.

Iva Ikuko Toguri d'Aquino being first duly sworn, deposes and says: that she is the defendant in the above-entitled action and is detained under process of this Court, without bail, in San Francisco County Jail No. 3, Dunbar and Washington Streets, San Francisco, California; that she is an adult person over the age of twenty-one (21) years; that ever since on or about July 25, 1941, she has continuously resided in Tokyo, Japan, where, on April 19, 1945, she was lawfully united in marriage to one, Felipe J. d'Aquino, who then and ever since his birth has been and still is a national and citizen of Portugal residing in Tokyo, Japan; that she thereby and thereon, pursuant to the law of Portugal, as also the law of Japan, as also by the law of all other civilized nations and by international law, became and ever since then continuously has been and now is a national and citizen of Portugal and in 1945 was formally naturalized as a Portuguese national by said marriage and by formal registration of said marriage as such a citizen of Portugal at the office of the Consul of Portugal at Tokyo, Japan; that ever since her said marriage she has resided at No. 396 Ikejiri Machi, Setagaya-Ku, Tokyo, Japan, with her said husband.

On August 26, 1948, defendant was arrested by agents of the United States, acting under orders of the Attorney General of the United States, and thereupon imprisoned in the Sugamo Prison, Tokyo, Japan, and thereafter was forcibly taken aboard the S. S. General F. R. Hodges, a U. S. transport vessel on which she was brought to San Francisco, California, on September 25, 1948, and while said vessel was in progress of docking at said port she was seized by agents of the U. S. Federal Bureau of Investigation upon a purported complaint filed in this Court on September 25, 1948, was brought before the U. S. Commissioner in this District and thereafter was indicted in this cause which is now pending in this court.

The defendant is an indigent; aside from used clothing and a few personal effects, the reasonable value of which does not exceed Twenty Five (\$25.00) Dollars, she possesses the following assets only, viz., the equivalent of the sum of approximately One Hundred (\$100.00) Dollars on deposit in the Postal Savings Bank in Tokyo, jointly with her husband in Tokyo, Japan, household furniture, dishes, trunk, sewing machine and utensils of the reasonable value of One Hundred (\$100.00) Dollars, and a remote claim or right, subservient to the right of the Attorney General as the Alien Property Custodian, in and to certain real property situated in Los Angeles County, California, described as follows, to-wit:

Lots 42 and 57 of the South Gate Tract in the Rancho Tajauta, as per map recorded in Book 13,

Pages 14 and 15 of Maps in the office of the County Recorder of said County, and portion of the 538.28 acre track of land allotted to Jose Maria Abila in the partition of Rancho Tajauta, Case number 1200 of the 17th Judicial District Court in the County of Los Angeles.

Which said property she is informed and believes has an approximate market value of Three Thousand Five Hundred (\$3,500.00) Dollars, the interest of the defendant therein, however, being at most a disputable claim and hence of substantially no value whatever to her.

By reason of her said poverty and indigency the defendant does not have sufficient means and is actually unable to bear the expense of producing her witnesses, hereinafter named, or any of them, to testify in person in her defense at the trial herein, or to bear the expense of their travel, subsistence and witness fees for attending the trial herein or to have issued and served upon them subpoenas requiring them to appear and testify at the trial herein.

That each of the witnesses, hereinafter named, is a necessary and material witness for the defendant on the trial of said action and the testimony of each is necessary and material to the defendant in her defense of said indictment.

That the defendant cannot safely proceed to a trial of said action without the testimony of said witnesses.

The witnesses whose testimony is necessary and material to be given in person at the trial herein, their places of residence, their nationalities and citizenships which are unknown to defendant but which she believes to be as hereinafter set forth, and the material and necessary testimony they are expected to give, in substance and effect, are as follows:

1. George H. Henshaw, 2025 Benedict Canyon Drive, Beverly Hills, California, a U. S. citizen, to testify that he was an ensign in the U. S. Navy who from 1942 to Aug. 15, 1945, was held as a prisoner of war by the Japanese at Tokyo, Japan; that he saw the defendant in June or July of 1944 in Tokyo and during said time was acquainted with, saw and conversed with various Allied officers and personnel held prisoners of war by the Japanese and who, under duress, were compelled to work at Radio Tokyo, Japan; that although all of said prisoners of war were held under coercion and duress they, nevertheless, did not serve the purposes of their oppressors but did their best to aid and comfort the U. S. and Allied cause; that the defendant did not compose any radio script; and that the Zero Hour program of Radio Tokyo in nowise served the purposes of the Japanese but was designed and conducted by the U. S. and Allied prisoners to aid the U. S. and Allied cause.

2. Chiyeko Ito, 3118 Blanchard Street, Los Angeles 33, California, a U. S. citizen, to testify that

she sailed to Japan in 1941 on the same boat as the defendant; that she thereafter was employed by the Domei News Agency in Tokyo; that she corresponded with the defendant in Japan between Dec. 7, 1941, and Aug. 15, 1945, and frequently saw and conversed with her between Nov. 1, 1943, and Aug. 15, 1945; that during said time the defendant expressed her loyalty to the U. S. and Allied cause and her confidence that the U. S. and its Allies were in the right and would win the war; that the defendant was kept under constant surveillance by the Japanese police authorities.

3. Amy Masuda, Los Angeles, California, a U. S. citizen, to testify that between Nov. 1, 1943, and Aug. 15, 1945, she was employed as a typist at Radio Tokyo, in Tokyo, Japan; that she was acquainted with the defendant during said period and saw her frequently and observed her at work; that the defendant never wrote or composed any radio script; that the defendant was compelled by Mr. Takano of Radio Tokyo to have a voice test made; that Kempeitai agents were at Radio Tokyo and that defendant and all the U. S. and Allied prisoners of war there forced to labor were held in duress by the Japanese and were in fear of their lives.

4. James F. Whitten, Torrance, Los Angeles County, California, a U. S. citizen, to testify that from about Nov. 1, 1943, to Aug. 15, 1945, he was

a U. S. naval officer and stationed at various U. S. naval stations and on various U. S. naval vessels in Southwestern Pacific Ocean areas; that from about Nov. 1, 1943, to Aug. 15, 1945, he daily listened to and monitored the radio broadcasts from Radio Tokyo, Tokyo, including the broadcasts of the Zero Hour program emanating therefrom; that no female voice on the Zero Hour program broadcast any propaganda for the Japanese or any matter or thing against the U. S. or its Allies; that the female voices thereon broadcast introductions to musical records played on said program and that this was limited to statements of the types of musical recordings, the composers thereof, the orchestras or soloists thereon and that the said introductions and musical recordings were of a lively nature that bolstered up the morale of U. S. and Allied listeners within listening range.

5. Martin Pray, 962 Ackerman Avenue, Syracuse 10, New York State, a U. S. citizen, to testify that he was a Sergeant in the U. S. Army stationed at Sugamo Prison, Tokyo, from about Nov. 16, 1945, to about Oct. 6, 1946; that he saw the defendant there almost daily during said period of time; that the defendant there was treated by the U. S. military and civil authorities as not being a U. S. citizen but as being a foreign national and was denied the privileges accorded citizen prisoners.

6. May E. Hagedorn, 4211 Olive Drive, Everett, Washington, a U. S. citizen, to testify that from

June 26, 1943, to Aug. 14, 1945, she was engaged as a civilian radio interceptor of shortwave radio broadcasts from Radio, Tokyo, Japan, and monitored the war prisoner's programs thereon, including the Zero Hour program thereon; that no female announcer broadcasting therefrom at any time during said period broadcast any propaganda for the Japanese or any news broadcast or commentaries or did any ad libbing thereon; that the prisoner of war messages broadcast thereon were restricted to announcements of the names of U. S. and Allied prisoners of war captured and held by the Japanese, their whereabouts and conditions; that the musical recordings announced by each of the female voices thereon were lively American and European classical, semi-classical and popular types; that no unlawful announcements against the U. S. or its Allies and no announcements in favor of the Japanese were made by any of the female voices thereon.

7. Norman Reyes, 1611 Eastland Avenue, Nashville, Tenn., a Philippine national lawfully admitted to and residing in the United States, to testify that he was a Lieutenant in the U. S. Army from sometime in 1942 to Aug. 15, 1945; that he was captured by the Japanese and held as a prisoner of war by them from sometime in 1942 to Aug. 15, 1945; that he and many other U. S. and Allied military, naval and marine officers and civilian personnel were held under coercion and duress by the Japanese after being taken prisoner by the Japanese; that he was held by the Japanese in Tokyo; that from about

Nov. 1, 1943, to Aug. 15, 1945, while he so was held under duress he almost daily saw and talked to the defendant and observed her in the performance of her employment; that the defendant during all of said period was loyal and devoted to the U. S. and Allied cause and that he and other prisoners of war held by the Japanese observed and knew of her said loyalty; that the defendant never wrote or composed any radio script of any nature whatever; that the defendant never announced or broadcast any propaganda for the Japanese; that she never announced or broadcast any news or news items for the Japanese; that she never committed any unlawful act against the U. S. or its Allies; that she never served any purpose of the Japanese; that she aided and comforted the U. S. and its Allies and U. S. and Allied prisoners of war held by the Japanese by secretly conveying to them news of U. S. and Allied military and naval successes against Japan for the purpose of bolstering up their morale and that her aid and comfort did bolster up their morale; that she secretly conveyed to said prisoners of war tobacco, food, medicine and other needed supplies for the purpose of aiding the U. S. and its Allies.

8. Mrs. Norman Reyes, 1611 Eastland Avenue, Nashville, Tenn., the wife of Norman Reyes above mentioned, and a Philippine national residing in the U. S., to testify that between Nov. 1, 1943, and Aug. 15, 1945, she was frequently present at the office of Radio Tokyo in Tokyo, Japan; that she then was acquainted with the defendant and saw her fre-

quently; that the defendant never wrote any radio script and that she never broadcast or announced via radio any propaganda or news for the Japanese; that all the U. S. and Allied prisoners of war who there, under coercion, intimidation and duress and in fear of their lives, were forced to labor by the Japanese did their utmost to defeat the purpose of their Japanese oppressors and were successful in achieving that result; that the Zero Hour program was restricted to reading of prisoner of war messages to U. S. and Allied troops to give their whereabouts and to bolster up the morale of the U. S. and Allied listeners and to the playing of familiar lively classical, semi-classical and popular American and European music for the pleasure of U. S. and Allied troops.

9. John E. Tunnicliffe, Route 4, Box 233, Grants Pass, Oregon, a U. S. citizen, to testify that he was held as a U. S. civilian prisoner of war by the Japanese from 1942 to Aug. 15, 1945; that from about Nov. 1, 1943, to Aug. 15, 1945, he was held as such a prisoner in Tokyo, Japan; that he, along with a number of other U. S. and Allied prisoners of war were compelled, under threats against their lives, to work at forced occupations by their Japanese captors; that agents of the Japanese secret police, the thought-control police termed the Kempeitai were maintained at Radio Tokyo to hold the said prisoners of war under constant coercion; that they and civilian aliens there forced to labor were held under duress, that the Zero Hour program in nowise aided

the Japanese but, on the contrary, was designed by the prisoners of war in charge thereof to aid the U. S. and Allied cause by bolstering up U. S. and Allied morale by broadcasting prisoner of war messages to Allied troops and lively music to give pleasure to Allied troops.

10. Mark L. Streeter, 1008 Cassia Street, Idaho Falls, Idaho, a U. S. citizen, to testify that from sometime in 1942 to about August 15, 1945, he was held as an American prisoner of war by the Japanese under duress in Tokyo, Japan; that he became acquainted with the defendant about Nov., 1943; that he saw her almost daily from said time to Aug. 15, 1945, at Radio Tokyo, and thereafter, over a period of approximately five months' time; that during said periods of time he conversed with the defendant; that he knows of his own knowledge and observation that the defendant during all of said times was loyal and devoted to the U. S. and its Allies and the U. S. and Allied cause; that the defendant during said periods of time deliberately concealed from the Japanese authorities information concerning the activities of U. S. and Allied prisoners of war which said activities were taken by said prisoners against the Japanese authorities and government; that the defendant continuously aided and comforted U. S. and Allied prisoners of war by secretly conveying to them news of U. S. and Allied military and naval successes for the purpose of bolstering up their morale; that, at

great personal risk, she secretly delivered to said prisoners of war tobacco, food, medicine and blankets; that he knows of his own knowledge that the defendant never composed or wrote any radio script whatever for the Japanese or their government; that the defendant never at any time whatever said, uttered or broadcast any propaganda or news items whatever, by radio or otherwise, for the Japanese; that the defendant never committed any overt or hostile act against the U. S. or any of its Allies but that, on the contrary, she aided and comforted the U. S. and its Allies; that during said times the defendant and many U. S. and Allied prisoners of war were held by the Japanese under duress and intimidation and were in fear for their own personal security.

11. John David Provo, whose address is believed to be at a U. S. Military Camp in Texas or Maryland, a U. S. citizen, to testify that he was held as a U. S. prisoner of war by the Japanese from 1942 to about Aug. 15, 1945, in Tokyo; that during said period of time he was intimidated, coerced and kept under constant duress by the Japanese; that during said period of time he frequently saw the defendant in Tokyo at her place of employment and observed her at her employment and knows the nature thereof and that the defendant neither wrote any radio script nor committed any overt or any other unlawful acts against the U. S. or its Allies; that from his own knowledge

and observation the defendant at all of said times was loyal and devoted to the U. S. and Allied cause and that she actively aided and comforted U. S. and Allied military, naval and marine officers and civilian personnel held prisoners of war by the Japanese by secretly conveying to them news of U. S. and Allied military and naval successes to bolster up their spirits and morale and by delivering to them tobacco, food and blankets of which they were in dire need.

12. Major Wallace E. Ince, also known as Ted Wallace Ince, Presidio, San Francisco, California, a U. S. citizen, to testify that from sometime in 1942 to Aug. 15, 1945, he was a U. S. prisoner of war held by the Japanese under coercion and duress; that from about Nov. 1, 1943, to sometime in the spring of 1945, while he was so held by the Japanese in Tokyo, Japan, he saw and talked to the defendant almost daily; that from conversations with her and from observing her he was aware that she was loyal and devoted to the U. S. and its Allies and to the cause of the U. S. and its Allies; that during said time he observed her at work and knows of his own knowledge that she never wrote or composed any radio script of any nature whatever and that she did not make any radio announcements or broadcasts of any news, news commentaries or propaganda for the Japanese government, nation or any of its agencies, citizens or subjects, or of any matter or thing favorable to any of them; that she did not announce or broadcast any statement

or thing against the U. S. or its Allies; that she aided and comforted U. S. and Allied prisoners of war during said period by secretly conveying to them news of Allied military, air force and naval successes for the purpose of aiding and bolstering up their morale which purpose it had in fact and that she secretly, at great personal risk to herself, delivered to U. S. and Allied prisoners of war, held under duress by the Japanese, tobacco, food and supplies in which they were of dire need for the purpose of aiding and comforting said prisoners of war and that such things did bolster up their morale and did aid and comfort them to defeat the purposes of the Japanese authorities.

Affiant alleges upon information and belief that each of the foregoing named witnesses is ready, willing and able to come to San Francisco to testify in behalf of the defendant provided his or her travel and subsistence expenses and witness fees will be defrayed.

Affiant alleges that the failure or refusal of the Court to authorize the production of the said witnesses to testify in person for the defendant at the trial herein or the failure of the Government to authorize subpoenas to be issued and served upon them and said witnesses to be produced at the trial herein for said purposes at the expense of the Government will result in a failure of justice and deprive her of a fair and impartial jury trial and of her right to obtain witnesses in her favor and of the due process of law guaranteed her by the pro-

visions of the Sixth and Fifth Amendments of the U. S. Constitution.

/s/ IVA IKUKO TOGURI
D'AQUINO,
Affiant.

Subscribed and sworn to before me this 5th day of April, 1949.

[Seal] /s/ C. W. CALBREATH,
Clerk, U. S. District Court, Northern District of
California.

Receipt of copy acknowledged.

[Endorsed]: Filed April 5, 1949.

[Title of District Court and Cause.]

NOTICE

To Frank J. Hennessy, United States Attorney, and
to Tom DeWolfe, Special Assistant to the At-
torney General, Attorneys for the Plaintiff:

You and each of you will please take notice that on Monday, the 25th day of April, 1949, at the Courtroom of the above-entitled Court, 3rd Floor, Post Office Building, 7th and Mission Streets, San Francisco, California, at the hour of 10 o'clock a.m. of said day, or so soon thereafter as counsel can be heard, the defendant will bring on for hearing the within motion.

Dated: April 21, 1949.

/s/ WAYNE M. COLLINS,
Attorney for Defendant.

[Title of District Court and Cause.]

MOTION FOR POSTPONEMENT OF
TIME OF TRIAL

The defendant hereby moves the Court for its order postponing the trial of the cause from May 16, 1949, to July 5, 1949, upon the ground and for the reason that she has been informed by Theodore Tamba, Esq., attorney associated with counsel for defendant, who is presently engaged in taking the depositions of defendant's witnesses in Japan and Hong Kong, that it will be impossible to complete the taking of said depositions on or by May 16, 1949, due to the fact that the witnesses there to be interviewed exceed forty in number, the residences and places of occupation of such witnesses in Japan are scattered not only in the Tokyo area but in cities other than Tokyo, that the means of transportation to locate, interview and arrange for the taking of said depositions are inadequate which has occasioned and occasions unexpected delay therein; that the problems of locating, interviewing, and arranging for the taking of said depositions, including arranging for interpreting from the Japanese to the English language in connection therewith, are more time consuming than originally estimated; that the taking of said depositions can be completed and the depositions returned to this Court on or by July 5, 1949; that the defendant cannot safely proceed to trial without the production of the testimony of her witnesses who are in Japan and Hong

Kong and that she acquiesces in a postponement of the trial of the cause for said purposes.

This motion will be made upon the pleadings, records and files herein and upon the notice of this motion and upon letters of Theodore Tamba, Esq., from Japan, to be offered in support of said motion if the Court or counsel for plaintiff require them to be offered in support thereof.

/s/ WAYNE M. COLLINS,
Attorney for Defendant.

Receipt of copy acknowledged.

[Endorsed]: Filed April 21, 1949.

District Court of the United States, Northern
District of California, Southern Division

At a Stated Term of the District Court of the United States for the Northern District of California, Southern Division, held at the Court Room thereof, in the City and County of San Francisco, on Monday, the 25th day of April, in the year of our Lord one thousand nine hundred and forty-nine.

Present: The Honorable Michael J. Roche,
District Judge.

[Title of Cause.]

ORDER

(Minute order authorizing issuance and service of subpoenas and motion for list of witnesses and veniremen to be continued to May 2, 1949, and ordering case continued from May 16, 1949, to July 5, 1949, for trial.)

This case came on this day for hearing as to the

following motions: motion to authorize issuance and service of subpoenas, motion for list of witnesses and veniremen, and motion to postpone date of trial.

The defendant was present in custody of the U. S. Marshal and with her attorney, Wayne Collins, Esq., Hon. Frank J. Hennessy, U. S. Atty., for U. S. On motion of Mr. Collins and with consent of Mr. Hennessy, it is Ordered that the motion to authorize the issuance and service of subpoenas and the motion for a list of witnesses and veniremen be continued to May 2, 1949. Further ordered, on motion of Mr. Collins, that this case be continued from May 16, 1949, to July 5, 1949, for trial.

[Title of District Court and Cause.]

NOTICE

To Frank J. Hennessy, United States Attorney,
and to Tom DeWolfe, Special Assistant to the
Attorney General, Attorneys for the Plaintiff:

You and each of you will please take notice that on Monday, the 9th day of May, 1949, at the Court Room of the above-entitled Court, 3rd Floor, Post Office Building, 7th and Mission Streets, San Francisco, California, at the hour of 10 o'clock a.m. of said day, or as soon thereafter as counsel can be heard, the defendant will bring on for hearing the within motion.

Dated: May 4, 1949.

/s/ WAYNE M. COLLINS,
Attorney for Defendant.

[Title of District Court and Cause.]

MOTION FOR ORDER AUTHORIZING AND
DIRECTING ISSUANCE AND SERVICE
OF SUBPOENAS REQUIRING ATTEND-
ANCE OF WITNESSES AT THE TRIAL
HEREIN AT THE EXPENSE OF THE
GOVERNMENT

The defendant, Iva Ikuko Toguri d'Aquino, moves the Court for its order authorizing and directing the issuance and service of subpoenas requiring the attendance of the hereinafter named witnesses, residing at the places hereinafter set forth, at the trial herein at the expense of the plaintiff, the U. S. Government.

The names, addresses and places of residence of the said witnesses are as follows:

1. Willesden Cox, 2627 Kingsten Pike, Knoxville, Tenn.
2. Frank Fujita, Fort Sill, Oklahoma.
3. Shigemi Mazawa, 4842 Winthrop St., Chicago, Illinois.
4. Jack Wisener, 4213 Red River Street, Austin, Texas.
5. Yoneko Matsunaga, New Jersey.
6. Milton Glazier, Dover, Idaho.

This motion is made upon the ground that each of the named witnesses is a necessary and material witness for the defendant on the trial of said action

and a witness whose testimony is necessary and material to the defendant in her defense to said action.

The facts to which each of the said witnesses is expected to testify and the materiality of that testimony is set forth in the affidavit of the defendant filed in support of this motion which is incorporated herein by reference for said purpose.

The defendant cannot safely proceed to trial of said action without the production of the person of each of said witnesses in court at the trial herein to testify in person so that the individual testimony, attitude and demeanor of each can be observed, considered and weighed by the Court and the jury.

This motion is also made upon the ground that the defendant is an indigent person and does not have sufficient means and is actually unable to pay the fees for the issuance and service of said subpoenas for said witnesses and is actually unable to pay the costs of transportation of said witnesses to attend the said trial of the action. Each of said witnesses is ready, willing and able to attend the trial and testify on behalf of the defendant in the event he or she is served with a subpoena and is paid the necessary witness fees and transportation expenses.

The failure or refusal of the Court to order or authorize the issuance and service of said subpoenas and the production of said witnesses at the trial herein at the expense of the Government will result in a failure of justice and deprive the defendant of her substantial constitutional and statutory rights

to a fair and impartial trial by jury and to obtain witnesses in her favor, in violation of the provisions of the Sixth Amendment and the due process of law guaranty of the Fifth Amendment of the Constitution.

This motion will be made and based upon the notice of this motion, said motion, affidavit in support thereof, and upon all the records, pleadings, files, court orders and documents herein, and upon the similar motions heretofore made herein for like service of subpoenas and for the taking of depositions filed herein on March 1, 1949, and April 5, 1949.

/s/ WAYNE M. COLLINS,
Attorney for Defendant.

Points and Authorities

Rules 17 and 26, Rules of Criminal Procedure.

Fifth Amendment, U. S. Constitution.

Sixth Amendment, U. S. Constitution.

Title 18 USCA, Sec. 3005.

Respectfully submitted,

/s/ WAYNE M. COLLINS,
Attorney for Defendant.

Affidavit in Support of Motion

Northern District of California,
State of California,

City and County of San Francisco—ss.

Iva Ikuko Toguri d'Aquino being first duly sworn, deposes and says: that she is the defendant in the above-entitled action and is detained under process of this Court, without bail, in San Francisco County Jail No. 3, Dunbar and Washington Streets, San Francisco, California; that she is an adult person over the age of twenty-one (21) years; that ever since on or about July 25, 1941, she has continuously resided in Tokyo, Japan, where, on April 19, 1945, she was lawfully united in marriage to one, Felipe J. d'Aquino, who then and ever since his birth has been and still is a national and citizen of Portugal residing in Tokyo, Japan; that she thereby and thereon, pursuant to the law of Portugal, as also the law of Japan, as also by the law of all other civilized nations and by international law, became and ever since then continuously has been and now is a national and citizen of Portugal and in 1945 was formally naturalized as a Portuguese national by said marriage and by formal registration of said marriage as such a citizen of Portugal at the office of the Consul of Portugal at Tokyo, Japan; that ever since her said marriage she has resided at No. 396 Ikejiri Machi, Setagaya-Ku, Tokyo, Japan, with her said husband.

On August 26, 1948, defendant was arrested by agents of the United States, acting under orders of the Attorney General of the United States, and thereupon imprisoned in the Sugamo Prison, Tokyo, Japan, and thereafter was forcibly taken aboard the S. S. General F. R. Hodges, a U. S. transport vessel on which she was brought to San Francisco, California, on September 25, 1948, and while said vessel was in progress of docking at said port she was seized by agents of the U. S. Federal Bureau of Investigation upon a purported complaint filed in this Court on September 25, 1948, was brought before the U. S. Commissioner in this District and thereafter was indicted in this cause which is now pending in this court.

The defendant is an indigent; aside from used clothing and a few personal effects, the reasonable value of which does not exceed Twenty Five (\$25.00) Dollars, she possesses the following assets only, viz., the equivalent of the sum of approximately One Hundred (\$100.00) Dollars on deposit in the Postal Savings Bank in Tokyo, jointly with her husband in Tokyo, Japan, household furniture, dishes, trunk, sewing machine and utensils of the reasonable value of One Hundred (\$100.00) Dollars, and a remote claim or right, subservient to the right of the Attorney General as the Alien Property Custodian, in and to certain real property situated in Los Angeles County, California, described as follows, to-wit:

Lots 42 and 57 of the South Gate Tract in the Rancho Tajauta, as per map recorded in Book 13, Pages 14 and 15 of Maps in the office of the County Recorder of said County, and portion of the 538.28 acre track of land allotted to Jose Maria Abila in the partition of Rancho Tajauta, Case number 1200 of the 17th Judicial District Court in the County of Los Angeles.

which said property she is informed and believes has an approximate market value of Three Thousand Five Hundred (\$3,500.00) Dollars, the interest of the defendant therein, however, being at most a disputable claim and hence of substantially no value whatever to her.

By reason of her said poverty and indigency the defendant does not have sufficient means and is actually unable to bear the expense of producing her witnesses, hereinafter named, or any of them, to testify in person in her defense at the trial herein, or to bear the expense of their travel, subsistence and witness fees for attending the trial herein or to have issued and served upon them subpoenas requiring them to appear and testify at the trial herein.

That each of the witnesses, hereinafter named, is a necessary and material witness for the defendant on the trial of said action and the testimony of each is necessary and material to the defendant in her defense of said indictment.

That the defendant cannot safely proceed to a trial of said action without the testimony of said witnesses.

The witnesses whose testimony is necessary and material to be given in person at the trial herein, their places of residence, their nationalities and citizenships which are unknown to defendant but which she believes to be as hereinafter set forth, and the material and necessary testimony they are expected to give, in substance and effect, are as follows:

1. Willesden Cox, 2627 Kingsten Pike, Knoxville, Tenn., a U. S. citizen, to testify that from about January, 1944, to about Aug. 15, 1945, he was a Major in the U. S. Army held as a prisoner of war by the Japanese at Bunka Prison Camp, Tokyo, Japan, along with a number of other captured U. S. and Allied officers, men and civilian personnel, each and all of whom were mistreated, intimidated, and held under duress by various Japanese army authorities and were threatened with loss of life if they failed to obey the orders of their captors; that a number of said prisoners of war were beaten by their captors for failure to obey the orders and commands of their captors; that all of said prisoners of war were kept in a constant state of fear by their Japanese captors and that each of those who were forced to broadcast from Radio Tokyo during said period of time and those who wrote script therefor did so under compulsion of the Japanese and were not free agents but acted solely under duress and coercion; that the defendant did not write any script or broadcast any news or propaganda for the Japanese but did aid and comfort the

prisoners of war by secretly delivering to them tobacco, food and medicine at great personal risk to herself; that Kempeitai agents kept said prisoners of war and said defendant under constant surveillance and in fear.

2. Frank Fujita, Fort Sill, Oklahoma, a U. S. citizen, to testify that from about September, 1944, to about Aug. 15, 1945, he was a U. S. soldier held prisoner by the Japanese at Bunka Prison Camp, Tokyo, Japan, along with a number of other U. S. and Allied officers, men and civilian personnel, each and all of whom were mistreated, undernourished and starved, and threatened with loss of life for failure to obey the commands of their captors; that a number of the said prisoners of war were beaten by the Japanese and all were held under continuous duress; that Kempeitai agents kept them and the defendant under continuous surveillance during said period; that the defendant never wrote any script and never broadcast or announced any news or propaganda for the Japanese; that there were a number of females announcing and broadcasting at Radio Tokyo during said period of time and that a number of the alien women broadcasters announced propaganda for the Japanese and to testify to names of each of such female broadcasters and the nature and types of their respective broadcasts; that the defendant never committed any unlawful act and never made any unlawful statement against the U. S. and its Allies and never in anywise aided the Japanese; that the defendant, at great personal

risk to her own security, secretly conveyed food, medicine and supplies to U. S. and Allied prisoners of war at Bunka Prison Camp to aid and comfort them and to assist them in defeating the purposes of the Japanese and secretly conveyed to said prisoners of war news of Allied successes for the purpose of bolstering up their morale.

3. Shigemi Mazawa, 4842 Winthrop St., Chicago, Illinois, a U. S. citizen, to testify that from sometime in early 1944 to about Aug. 15, 1945, he was forced to work at Radio Tokyo, Tokyo, Japan; that he has been acquainted with the defendant since early 1944 and saw her frequently at Radio Tokyo during said period of time; that he knows the nature of her employment there; that during said period the defendant orally expressed her confidence and faith in the U. S. and Allied cause and her sympathy for the prisoners of war held at Bunka Prison Camp who were coerced into working at Radio Tokyo; that the defendant never wrote any radio script during said period and never broadcast any unlawful statement or committed any unlawful act detrimental to the U. S. and its Allies; that the defendant was not a free agent while at Radio Tokyo and that none of the prisoners of war there forced to work by the Japanese were free agents but all were held under duress and were kept under continuous surveillance and in fear by the Japanese secret military police; and to testify to the period of time the defendant was employed, the number

of days per week of that employment and the hours thereof and the vacation periods she was given and the number and times of her absences therefrom.

4. Jack Wisener, 4213 Red River Street, Austin, Texas, a U. S. citizen, to testify that from the latter part of 1943 to about Aug. 15, 1945, he was a lieutenant in the U. S. Army held under duress as a prisoner of war by the Japanese at Bunka Prison Camp, Tokyo, Japan, along with a number of other U. S. and Allied prisoners of war likewise held by the Japanese under duress; that a number of the prisoners of war there held were slapped and beaten by the Japanese for failure to comply with their demands and to obey their orders; that they were compelled to comply with the orders of their captors to save their lives and that all of them suffered for lack of food and most of them were rendered ill by their mistreatment; that Kempeitai agents kept them and the defendant under continuous surveillance and in fear of their lives; that the defendant aided and comforted the U. S. and Allied prisoners of war at Bunka Prison Camp by secretly conveying to them news of U. S. and Allied military and naval successes to bolster up their spirits and by conveying secretly to them tobacco, food and medicine for like purposes; that the defendant neither wrote radio script nor broadcast any unlawful statement against the U. S. and its Allies.

5. Yoneko Matsunaga, New Jersey, a U. S. citizen, to testify that she has been acquainted with the

defendant since sometime during 1942; that she attended a school in Japan when defendant was in attendance at school; that she was employed at Radio Tokyo between November 1, 1943, and Aug. 15, 1945; and that she is familiar with the dates, hours, days and period of time the defendant was employed in Japan, the nature and duties of said employment; that during said period of time the defendant expressed her confidence and faith in the U. S. and Allied cause to her; that she frequently saw defendant at her employment and knows of her own knowledge that the defendant never wrote any Radio script and never broadcast any news or propaganda for the Japanese; that there were a number of female broadcasters employed at Radio Tokyo on the Zero Hour program and on other radio programs there broadcast, the names of said females and the nature and content of their respective broadcasts; and to testify to the nature of the defendant's employment, the period of time she was employed, the hours she worked and the days she was absent therefrom.

6. Milton Glazier, Dover, Idaho, a U. S. citizen, to testify he was a soldier in the U. S. Army held as a prisoner of war by the Japanese at Bunka Prison Camp, Tokyo, Japan, from about May, 1945, to about Aug. 23, 1945; that he and all other U. S. and Allied prisoners of war then and there held by the Japanese long had been held and all during said period were held under duress by the Japanese and were intimidated, starved and coerced into obeying

commands of their oppressors; that a number of said prisoners were coerced into working at Radio Tokyo by the Japanese and that the said prisoners endeavored to defeat and did succeed in defeating the purpose of their Japanese oppressors; that the defendant did not write any radio script and was not employed so to do and to his knowledge never broadcast anything detrimental to the U. S. and Allied cause; that there were a number of females who were announcers at Radio Tokyo and to distinguish them from the defendant and their duties from the defendant's; that he never heard the name Tokyo Rose applied to the defendant in Japan; that Kempeitai and police agents kept the defendant and the prisoners of war under constant surveillance and continuous fear.

Affiant alleges upon information and belief that each of the foregoing named witnesses is ready, willing and able to come to San Francisco to testify in behalf of the defendant provided his or her travel and subsistence expenses and witness fees will be defrayed.

Affiant alleges that the failure or refusal of the Court to authorize the production of the said witnesses to testify in person for the defendant at the trial herein or the failure of the Government to authorize subpoenas to be issued and served upon them and said witnesses to be produced at the trial herein for said purposes at the expense of the Government will result in a failure of justice and deprive her of a fair and impartial jury trial and of

her right to obtain witnesses in her favor and of the due process of law guaranteed her by the provisions of the Sixth and Fifth Amendments of the U. S. Constitution.

/s/ IVA IKUKO TOGURI
D'AQUINO,
Affiant.

Subscribed and sworn to before me this 4th day of May, 1949.

[Seal] /s/ C. M. TAYLOR,
Deputy Clerk, U. S. District Court, Northern District of California.

Receipt of copy acknowledged.

[Endorsed]: Filed May 4, 1949.

[Title of District Court and Cause.]

ORDER GRANTING DEFENDANT'S MOTIONS
FOR ORDER AUTHORIZING AND DIRECTING
ISSUANCE AND SERVICE OF
SUBPOENAS OF DEFENDANT'S WIT-
NESSES AT TRIAL HEREIN AT THE EX-
PENSE OF THE GOVERNMENT

The motions of the defendant for order authorizing and directing the issuance and service of subpoenas requiring the attendance of defendant's witness at the trial herein at the expense of the Government, filed herein on April 5, 1949, and May

3, 1949, having come on to be heard on May 9, 1949, Wayne M. Collins, Esq., appearing for the defendant and Frank J. Hennessy, U. S. Attorney, appearing for the plaintiff, and counsel for the plaintiff having informed the Court that the plaintiff will subpoena and produce at the trial the following persons as witnesses for the plaintiff, namely, Amy Masuda (Emi Matsuda or Masuda), Norman Reyes and Wallace E. Ince, and counsel for the defendant having orally informed the Court that Martin Pray is expected to be in the vicinity of San Francisco in the latter part of June, 1949, and the motions having been duly argued and thereupon submitted to the Court for decision and the motion being duly considered by the Court,

The Court finds that each of the herein named witnesses is a necessary and material witness for the defendant at the trial of said action and is a witness whose testimony is necessary and material to the defendant in her defense to said action; that the defendant cannot safely proceed to a trial of said action without the production of the person of each said witness in court at the trial herein to testify in person so that the individual testimony, attitude and demeanor of each can be observed, considered and weighed by the Court and the jury at the trial herein; and that the defendant is indigent and does not have sufficient means and is actually unable to pay the fees for the issuance and service of subpoenas and the production of said witnesses at the trial herein and is actually unable to pay the

expenses of transportation of said witnesses to attend the said trial; and that a denial of said motions would violate the provisions of Rule 17 RCP and deprive the defendant of her substantial constitutional rights to an impartial trial by jury and to obtain witnesses in her favor, contrary to the provisions of the Fifth and Sixth Amendments,

Now, Therefore, It Is Ordered that the defendant's said motions be granted and that subpoenas be issued for the defendant's witnesses, hereinafter named, at their respective places of residence and be served upon them and that the cost thereof and their respective witness fees and travel expenses to attend the trial of the cause herein be paid by the United States Government, to-wit:—

1. George H. Henshaw, 2025 Benedict Canyon Drive, Beverly Hills, California
2. Chiyeko Ito, 3118 Blanchard Street, Los Angeles 33, California
3. James F. Whitten, Torrance, Los Angeles County, California
4. May E. Hagedorn, 4211 Olive Drive, Everett, Washington
5. Mrs. Norman Reyes (Katherine Reyes), 6412 South Ellis Street, Chicago, Illinois
6. John E. Tunncliffe, Route 4, Box 233, Grants Pass, Oregon
7. Mark L. Streeter, 1008 Cassia Street, Idaho Falls, Idaho

8. John David Provoo, Walter Reed Hospital, Washington, D. C.

9. Willesdon (Williston) Cox, 2627 Kingsten Pike, Knoxville, Tenn.

10. Frank Fujita, Electra, Texas

11. Shigemi Mazawa, 4842 Winthrop Street, Chicago, Illinois

12. Jack Wisener, 4213 Red River Street, Austin, Texas

13. Mrs. Albert Kanzaki, nee Yoneko Matsunaga, 54 West 89th Street, New York, N. Y.

14. Milton Glazier, Dover, Idaho

15. Amy Masuda (Emi Matsuda or Masuda), 212 North Fremont Ave., Los Angeles 12, Calif.

16. Norman Reyes, 1611 Eastland Avenue, Nashville, Tenn.

17. Captain Wallace E. Ince, Presidio, San Francisco, Calif.

Provided, however, that in the event the plaintiff issues and has subpoenas served upon the said Amy Masuda (Emi Matsuda or Masuda), Norman Reyes and Major Wallace E. Ince or produces them at the trial herein as witnesses for the plaintiff there shall be no duplication in payment by the Government of their transportation expenses and witness fees.

And It Is Ordered that the defendant's motion to produce the defendant's witness Martin Pray at

Government expense be denied, without prejudice, however, to a subsequent like motion to be made by defendant for the production of said witness, upon a showing duly to be made.

Dated: May 18, 1949.

/s/ MICHAEL J. ROCHE,
U. S. District Judge.

Receipt of copy acknowledged.

[Endorsed]: Filed May 18, 1949.

[Title of District Court and Cause.]

ORDER

(Denying motion for lists of witnesses and veniremen, and denying motion of defendant for an order of this court to require the plaintiff to supply defendant with a list of the names of the witnesses to be produced on the trial for proving the indictment, together with a statement giving the place of abode of each such witness, and also for its order requiring the plaintiff to supply the defendant at least three days before the trial with a list of the veniremen stating the abode of each venireman.)

The above-entitled matter coming on for hearing this 9th day of May, 1949, before the Court at 10:00 o'clock a.m., Frank J. Hennessy, United States Attorney, appearing for plaintiff, and Wayne M. Collins, appearing for the defendant, and the matter

having been heard by the Court, and submitted to the Court for decision,

It Is Hereby Ordered that the motion of defendant for such order be, at this time, Denied without prejudice to its renewal by the defendant hereafter.

Signed in open Court this 18th day of May, 1949.

/s/ MICHAEL J. ROCHE,
U. S. District Judge.

Approved As To Form, as provided by Rule 22:

/s/ WAYNE M. COLLINS,
Attorney for Defendant.

[Endorsed]: Filed May 18, 1949.

[Title of District Court and Cause.]

NOTICE

To Frank J. Hennessy, United States Attorney, and to Tom DeWolfe, Special Assistant to the Attorney General, Attorneys for the Plaintiff:

You and each of you will please take notice that on the 31st day of May, 1949, at the Courtroom of the above-entitled Court, 3rd Floor, Post Office Building, 7th and Mission Streets, San Francisco, California, at the hour of 10 o'clock a.m. of said day, or so soon thereafter as counsel can be heard, the defendant will bring on for hearing the within motion.

Dated: May 24, 1949.

/s/ WAYNE M. COLLINS,
Attorney for Defendant.

[Title of District Court and Cause.]

I.

MOTION FOR ORDER AUTHORIZING AND
DIRECTING ISSUANCE AND SERVICE
OF SUBPOENAS REQUIRING ATTEND-
ANCE OF WITNESSES AT THE TRIAL
HEREIN AT THE EXPENSE OF THE
GOVERNMENT

The defendant, Iva Ikuko Toguri d'Aquino, moves the Court for its order authorizing and directing the issuance and service of subpoenas requiring the attendance of the hereinafter named witnesses, residing at the places hereinafter set forth, at the trial herein at the expense of the plaintiff, the U. S. Government.

The names, addresses and places of residence of the said witnesses are as follows:

1. Albert Rickert, Care Pacific American Fisheries, Bellingham, Washington
2. Edwin Kalbfleish, Jr., 1702 Bellevue, Richmond Heights 17, Missouri

This motion is made upon the ground that each of the named witnesses is a necessary and material witness for the defendant on the trial of said action and a witness whose testimony is necessary and material to the defendant in her defense to said action.

The facts to which each of the said witnesses is expected to testify and the materiality of that testi-

mony is set forth in the affidavit of the defendant filed in support of this motion which is incorporated herein by reference for said purpose.

The defendant cannot safely proceed to trial of said action without the production of the person of each of said witnesses in court at the trial herein to testify in person so that the individual testimony, attitude and demeanor of each can be observed, considered and weighed by the Court and the jury.

This motion is also made upon the ground that the defendant is an indigent person and does not have sufficient means and is actually unable to pay the fees for the issuance and service of said subpoenas for said witnesses and is actually unable to pay the costs of transportation of said witnesses to attend the said trial of the action. Each of said witnesses is ready, willing and able to attend the trial and testify on behalf of the defendant in the event he is served with a subpoena and is paid the necessary witness fees and transportation expenses.

The failure or refusal of the Court to order or authorize the issuance and service of said subpoenas and the production of said witnesses at the trial herein at the expense of the Government will result in a failure of justice and deprive the defendant of her substantial constitutional and statutory rights to a fair and impartial trial by jury and to obtain witnesses in her favor, in violation of the provisions of the Sixth Amendment and the due process of law guaranty of the Fifth Amendment of the Constitution.

This motion will be made and based upon the notice of this motion, said motion, affidavit in support thereof, and upon all the records, pleadings, files, court orders and documents herein, and upon the similar motion heretofore made herein for like service of subpoenas and for the taking of depositions filed herein on March 1, 1949 and April 5, 1949.

/s/ WAYNE M. COLLINS,
Attorney for Defendant.

Points and Authorities

Rules 17 and 26, Rules of Criminal Procedure.

Fifth Amendment, U. S. Constitution.

Sixth Amendment, U. S. Constitution.

Title 18 USCA, Sec. 3005.

Respectfully submitted,

/s/ WAYNE M. COLLINS,
Attorney for Defendant.

[Title of District Court and Cause.]

Affidavit in Support of Motion

Northern District of California,

State of California,

City and County of San Francisco—ss.

Iva Ikuko Toguri d'Aquino being first duly sworn, deposes and says: that she is the defendant in the above-entitled action and is detained under process

of this Court, without bail, in San Francisco County Jail No. 3, Dunbar and Washington Streets, San Francisco, California; that she is an adult person over the age of twenty-one (21) years; that ever since on or about July 25, 1941, she has continuously resided in Tokyo, Japan, where, on April 19, 1945, she was lawfully united in marriage to one, Felipe J. d'Aquino, who then and ever since his birth has been and still is a national and citizen of Portugal residing in Tokyo, Japan; that she thereby and thereon, pursuant to the law of Portugal, as also the law of Japan, as also by the law of all other civilized nations and by international law, became and ever since then continuously has been and now is a national and citizen of Portugal and in 1945 was formally naturalized as a Portuguese national by said marriage and by formal registration of said marriage as such a citizen of Portugal at the office of the Consul of Portugal at Tokyo, Japan; that ever since her said marriage she has resided at No. 396 Ikejiri Machi, Setagaya-Ku, Tokyo, Japan, with her said husband.

On August 26, 1948, defendant was arrested by agents of the United States, acting under orders of the Attorney General of the United States, and thereupon imprisoned in the Sugamo Prison, Tokyo, Japan, and thereafter was forcibly taken aboard the S. S. General F. R. Hodges, a U. S. transport vessel on which she was brought to San Francisco, California, on September 25, 1948, and while said vessel was in progress of docking at said port she was

seized by agents of the U. S. Federal Bureau of Investigation upon a purported complaint filed in this Court on September 25, 1948, was brought before the U. S. Commissioner in this District and thereafter was indicted in this cause which is now pending in this court.

The defendant is an indigent; aside from used clothing and a few personal effects, the reasonable value of which does not exceed Twenty Five (\$25.00) Dollars, she possesses the following assets only, viz., the equivalent of the sum of approximately One Hundred (\$100.00) Dollars on deposit in the Postal Savings Bank in Tokyo, jointly with her husband in Tokyo, Japan, household furniture, dishes, trunk, sewing machine and utensils of the reasonable value of One Hundred (\$100.00) Dollars, and a remote claim or right, subservient to the right of the Attorney General as the Alien Property Custodian, in and to certain real property situated in Los Angeles County, California, described as follows, to-wit:

Lots 42 and 57 of the South Gate Tract in the Rancho Tajauta, as per map recorded in Book 13, Pages 14 and 15 of Maps in the office of the County Recorder of said County, and portion of the 538.28 acre track of land allotted to Jose Maria Abila in the partition of Rancho Tajauta, Case number 1200 of the 17th Judicial District Court in the County of Los Angeles.

which said property she is informed and believes has an approximate market value of Three Thousand

Five Hundred (\$3,500.00) Dollars, the interest of the defendant therein, however, being at most a disputable claim and hence of substantially no value whatever to her.

By reason of her said poverty and indigency the defendant does not have sufficient means and is actually unable to bear the expense of producing her witnesses, hereinafter named, or any of them, to testify in person in her defense at the trial herein, or to bear the expense of their travel, subsistence and witness fees for attending the trial herein or to have issued and served upon them subpoenas requiring them to appear and testify at the trial herein.

That each of the witnesses, hereinafter named, is a necessary and material witness for the defendant on the trial of said action and the testimony of each is necessary and material to the defendant in her defense of said indictment.

That the defendant cannot safely proceed to a trial of said action without the testimony of said witnesses.

The witnesses whose testimony is necessary and material to be given in person at the trial herein, their places of residence, their nationalities and citizenships which are unknown to defendant but which she believes to be as hereinafter set forth, and the material and necessary testimony they are expected to give, in substance and effect, are as follows:

1. Albert Rickert, Care Pacific American Fisheries, Bellingham, Washington, a U. S. citizen, to testify that he was a non-commissioned officer in the

U. S. Marine Corps held as a prisoner of war by the Japanese along with over twenty-five other U. S. and Allied officers and men and civilian personnel, each of whom he is to identify, at Bunka Prison Camp, Tokyo, Japan, from about November, 1943, to about August 15, 1945; that said persons were coerced and intimidated by their oppressors into broadcasting for the Japanese at Radio Tokyo under threats of the Japanese authorities that if they refused to obey they would be executed; that they were beaten by their Japanese oppressors and were starved and that they were forced to eat leaves, cats and dogs to sustain their lives; to identify the defendant and the female announcers at Radio Tokyo and to state their respective activities during said period of time and to relate the conditions under which they and the said prisoners were compelled to labor and suffer and to the fact that the Kempeitai kept them all under constant surveillance and fear; that the said prisoners secretly received tobacco, food and medicine from the defendant and others who sustained them in their efforts to defeat the purposes of the Japanese; that a number of said prisoners made complaints against their said mistreatment to the Japanese authorities.

2. Edwin Kalbfleish, Jr., 1702 Bellevue, Richmond Heights, 17, Missouri, a U. S. citizen, to testify that he was a U. S. army officer who was taken prisoner by the Japanese in 1942 and thereafter was detained by them at Bunka Prison Camp, Tokyo, Japan, from October, 1942, or earlier, to the

summer of 1945, along with over twenty-five other U. S. and Allied officers and men and civilian personnel; that during said period said persons were held under duress and were intimidated and coerced into broadcasting via radio for their Japanese oppressors' under threats against their lives if they failed to obey; that they were mistreated, beaten and starved by the Japanese; that the announcers on the Zero Hour and other broadcast programs were compelled to broadcast by the Japanese and that, although they were kept under constant surveillance by the Kempeitai and other Japanese authorities, they managed to defeat the purposes of the Japanese and to relate the methods employed in so doing; to identify the male and female announcers on those programs and to testify to the nature and contents of their broadcasts and the names of the persons who composed the script therefor; that a number of persons, including the defendant, secretly conveyed food to the said prisoners of war to sustain them; that he and other prisoners complained to the Japanese authorities about the conditions under which they were forced to live and to produce copies of his and their written complaints and reports of their suffering so made.

Affiant alleges upon information and belief that each of the foregoing named witnesses is ready, willing and able to come to San Francisco to testify in behalf of the defendant provided his or her travel and subsistence expenses and witness fees will be defrayed.

Affiant alleges that the failure or refusal of the Court to authorize the production of the said witnesses to testify in person for the defendant at the trial herein or the failure of the Government to authorize subpoenas to be issued and served upon them and said witnesses to be produced at the trial herein for said purposes at the expense of the Government and will result in a failure of justice and deprive her of a fair and impartial jury trial and of her right to obtain witnesses in her favor and of the due process of law guaranteed her by the provisions of the Sixth and Fifth Amendments of the U. S. Constitution.

/s/ IVA IKUKO TOGURI
D'AQUINO,
Affiant.

Subscribed and sworn to before me this 24th day of May, 1949.

[Seal] /s/ C. M. TAYLOR,
Deputy Clerk, U. S. District Court, Northern District of California.

Receipt of copy acknowledged.

[Endorsed]: Filed May 24, 1949.

[Title of District Court and Cause.]

ORDER GRANTING DEFENDANT'S MOTION
FOR ORDER AUTHORIZING AND DI-
RECTING ISSUANCE AND SERVICE OF
SUBPOENAS OF DEFENDANT'S WIT-
NESSES AT TRIAL HEREIN AT THE EX-
PENSE OF THE GOVERNMENT

The motion of the defendant for order authorizing and directing the issuance and service of subpoenas requiring the attendance of defendant's witness at the trial herein at the expense of the Government, filed herein on May 24, 1949, having come on to be heard on May 31, 1949, Wayne M. Collins, Esq., appearing for the defendant and Frank J. Hennessy, U. S. Attorney, appearing for the plaintiff, and the motion having been duly argued and thereupon submitted to the Court for decision and the motion being duly considered by the Court,

The Court finds that each of the herein named witnesses is a necessary and material witness for the defendant at the trial of said action and is a witness whose testimony is necessary and material to the defendant in her defense to said action; that the defendant cannot safely proceed to a trial of said action without the production of the person of each said witness in court at the trial herein to testify in person so that the individual testimony, attitude and demeanor of each can be observed, considered and weighed by the Court and the jury at the trial herein; and that the defendant is indigent

and does not have sufficient means and is actually unable to pay the fees for the issuance and service of subpoenas and the production of said witnesses at the trial herein and is actually unable to pay the expenses of transportation of said witnesses to attend the said trial; and that a denial of said motions would violate the provisions of Rule 17 RCP and deprive the defendant of her substantial constitutional rights to an impartial trial by jury and to obtain witnesses in her favor, 'contrary to the provisions of the Fifth and Sixth Amendments,

Now, Therefore, It Is Ordered that the defendant's said motions be granted and that subpoenas be issued for the defendant's witnesses, hereinafter named, at their respective places of residence and be served upon them and that the cost thereof and their respective witness fees and travel expenses to attend the trial of the cause herein be paid by the United States Government, to-wit:—

1. Albert Rickert, Care Pacific American Fisheries, Bellingham, Washington
2. Edwin Kalbfleish, Jr., 1702 Bellevue, Richmond Heights 17, Missouri

Dated: June 1st, 1949.

/s/ MICHAEL J. ROCHE,
U. S. District Judge.

Receipt of copy acknowledged.

[Endorsed]: Filed June 1, 1949.

[Title of District Court and Cause.]

MOTION FOR LISTS OF WITNESSES
AND VENIREMEN

The defendant moves this Court, under Title 18 USCA, Sec. 3432, (formerly Sec. 562), for the order of this Court requiring the plaintiff or its counsel to supply the defendant with a list of the names of the witnesses to be produced on the trial for proving the indictment herein together with a statement giving the place of abode of each such witness and also for its order requiring the plaintiff or its counsel to supply the defendant at least three entire days before the trial with a list of the veniremen stating the abode of each venireman.

/s/ WAYNE M. COLLINS,
Attorney for Defendant.

Points and Authorities in Support of Motion

Title 18 USCA, Sec. 3432 (formerly Sec. 562) reads as follows:

“A person charged with treason or other capital offense shall at least three entire days before commencement of trial be furnished with a copy of the indictment and a list of the veniremen, and of the witnesses to be produced on the trial for proving the indictment, stating the place of abode of each venireman and witness.”

The provision is mandatory. See *Logan v. U. S.* 144 U. S. 263, 304, and *McNabb v. U. S.* (CCA-

Tenn), 123 Fed. 2d. 848, 853, rev. on other grounds, 318 U. S. 332. The purpose of the statute is to enable a defendant to investigate the jurors and the witnesses.

Respectfully submitted,

/s/ WAYNE M. COLLINS,

Attorney for Defendant.

Receipt of copy acknowledged.

[Endorsed]: Filed June 16, 1949.

[Title of District Court and Cause.]

MOTION FOR SUPPLEMENTAL ORDER AUTHORIZING ADDITIONAL SUBSISTENCE EXPENSES TO BE PAID DEFENDANT'S COUNSEL FOR ATTENDING EXAMINATIONS OF WITNESSES

Defendant moves the Court for its order authorizing the Government to pay to her counsel Theodore Tamba, Esq., the additional sum of Three Hundred Dollars (\$300.00) as and for his subsistence expenses while engaged in the taking of depositions of defendant's witnesses in Japan in this cause.

/s/ WAYNE M. COLLINS,

Attorney for Defendant.

State of California,

City and County of San Francisco—ss.

Theodore Tamba, being first duly sworn, deposes and says: that on March 25, 1949, he departed by

plane for Japan via the Northwest Airline and on arrival there located witnesses for the defense, interviewed them and took some thirty one (31) depositions for and on behalf of the defendant in the foregoing cause; that he returned by plane via said Northwest Airline and arrived in San Francisco, California, on the night of June 7, 1949; that traveling to and from Japan and the taking of said depositions consumed a total of seventy-five (75) days; that heretofore, by order of this Court made and entered herein on March 15, 1949, his subsistence expenses, at the rate of \$10 per day, was estimated to amount to a sum of \$450 covering an estimated period of forty-five (45) days and was authorized to be paid by the Government; by reason of the fact, that the taking of the necessary and material depositions necessarily consumed a total of seventy-five (75) days, that is to say, thirty (30) days in addition to the number of days originally estimated and provided for by the said order of this Court, he requests an order of this Court authorizing that the said sum of three hundred dollars (\$300.00) be paid to him by the Government for said subsistence.

/s/ THEODORE TAMBA.

Subscribed and sworn to before me this 16th day of June, 1949.

[Seal] /s/ ERNEST BESIG,
Notary Public in and for the City and County of
San Francisco, State of California.

[Endorsed]: Filed June 16, 1949.

[Title of District Court and Cause.]

MOTION FOR PRODUCTION OF DOCUMENTARY EVIDENCE

(Rule 17(c) RCP)

Defendant moves the Court for its order directing Frank J. Hennessy, U. S. Attorney, and Tom DeWolfe, Special Assistant to the Attorney General, attorneys for the plaintiff, to produce before the above-entitled Court, for inspection by the defendant and her counsel, at a time to be determined by the Court prior to the trial or prior to the time when they are to be offered or sought to be offered in evidence or used at the trial herein, the following documents:—

1. The original, or copies of, letters, radiograms, wireless messages and other written memoranda, including requests, orders, instructions or process of the Attorney General, the Department of Justice or its agents, addressed or sent to the Supreme Commander, Allied Powers (SCAP), Tokyo, Japan, the Commander of the U. S. Eighth Army in Japan, the Counter Intelligence Corps, U. S. Army, in Japan, the Commanding Officer of Sugamo Prison in Tokyo, Japan, the Commanding Officer of Yokohama Prison in Yokohama, Japan, the Secretary of State and Department of State in Washington, and to its consular or other agent or agents in Japan, and replies received thereto from said officers, departments or agents between on or about August 15,

1945, to and including September 25, 1948, complaining of the defendant or directing or requesting the following things: the arrest of the defendant on or about September 5, 1945, at Yokohama, Japan, by agents of the U. S.; her detention there until September 6, 1945, and her then release therefrom; the arrest of the defendant on or about October 16, 1945, at Tokyo, Japan, by agents of the U. S. and her imprisonment by them at the Yokohama Prison in Yokohama, Japan, until November 16, 1945, and thereafter from then to October 25, 1946, at the Sugamo Prison in Tokyo, Japan, and her then release therefrom; her arrest on or about August 26, 1948, at Tokyo, Japan, by agents of the U. S., and imprisonment in Sugamo Prison, Tokyo, Japan, and her transportation therefrom to the S. S. General F. R. Hodges, a U. S. transport vessel, and thence to San Francisco, California, by said vessel which here arrived on September 25, 1948; or relating to any of said things.

2. The original or copies of letters, radiograms, wireless messages and other written memoranda, including requests, orders, instructions or process of the Supreme Commander, Allied Powers (SCAP), Tokyo, Japan, addressed or sent to Tom C. Clark, Attorney General, or the Department of Justice, Washington, D. C., or to the agents of said Department, the Commander of the U. S. Eighth Army in Japan, the Counter Intelligence Corps, U. S. Army, in Japan, the Commanding Officer of Sugamo

Prison in Tokyo, Japan, the Commanding Officer of Yokohama Prison in Yokohama, Japan, the Secretary of State or Department of State in Washington, D. C., and to its consular or other agent or agents in Japan, and replies received thereto from said officers, departments or agents, between on or about August 15, 1945, to and including September 25, 1948, authorizing, directing or requesting the following things: the arrest of the defendant on or about September 5, 1945, at Yokohama, Japan, by agents of the U. S.; her detention there until September 6, 1945, and her then release therefrom; the arrest of the defendant on or about October 16, 1945, at Tokyo, Japan, by agents of the U. S. and her imprisonment by them at the Yokohama Prison in Yokohama, Japan, until November 16, 1945, and thereafter from then to October 25, 1946, at the Sugamo Prison in Tokyo, Japan, and her then release therefrom; her arrest on or about August 26, 1948, at Tokyo, Japan, by agents of the U. S., and imprisonment in Sugamo Prison, Tokyo, Japan, and her transportation therefrom to the S. S. General F. R. Hodges, a U. S. transport vessel, and thence to San Francisco, California, by said vessel which here arrived on September 25, 1948; or relating to any of said things.

3. The original or copies of letters, radiograms, wireless messages and other written memoranda, including requests, orders, instructions and process of the Secretary of State, the Department of State, and also of its consular or other agent or agents in Japan, addressed or sent to Tom C. Clark, as the

Attorney General, or to the Department of Justice or agents of said Department, the Supreme Commander, Allied Powers (SCAP), Tokyo, Japan, the Commander of the U. S. Eighth Army, in Japan, the Counter Intelligence Corps, U. S. Army, Japan, the Commanding Officer of Sugamo Prison in Tokyo, Japan, and the replies received thereto from said officers, departments or agents, between on or about August 15, 1945, to and including September 25, 1948, authorizing, directing or requesting the following things: the arrest of the defendant on or about September 5, 1945, at Yokohama, Japan, by agents of the U. S.; her detention there until September 6, 1945, and her then release therefrom; the arrest of the defendant on or about October 16, 1945, at Tokyo, Japan, by agents of the U. S. and her imprisonment by them at the Yokohama Prison in Yokohama, Japan, until November 16, 1945, and thereafter from then to October 25, 1946, at the Sugamo Prison in Tokyo, Japan, and her then release therefrom; her arrest on or about August 26, 1948, at Tokyo, Japan, by agents of the U. S., and imprisonment in Sugamo Prison, Tokyo, Japan, and her transportation therefrom to the S. S. General F. R. Hodges, a U. S. transport vessel, and thence to San Francisco, California, by said vessel which here arrived on September 25, 1948; or relating to any of said things.

4. Any and all written charges, accusations or complaints made, brought or filed by authority of

the plaintiff, the United States, including the United States Army, SCAP, the U. S. Eighth Army, the Counter Intelligence Corps of the U. S. Army in Japan, the Attorney General, the Department of Justice, and the State Department in Japan, against the defendant between August 13, 1943, and September 25, 1948, together with any and all records made or kept of any and all examinations, hearings or trials of the defendant had thereon and the disposition made thereof.

5. The original records, or copies thereof, of the Sugamo Prison and Yokohama Prison relating to the defendant, and, in particular, those records, letters, messages, files, letters, instructions and process relating to the arrests, incarcerations and releases of the defendant from imprisonment as mentioned in paragraphs 1, 2, 3, and 4 hereinabove.

6. Any and all radio script, or copies thereof, the plaintiff asserts or claims was prepared, composed, written, typed, used, read, announced or broadcast by radio by the defendant between about November 1, 1943, and on or about August 13, 1945, at or from Radio Tokyo or Radio Station JOAK in Japan.

7. Any and all phonographic recordings the plaintiff asserts or claims to be made of the defendant's voice between about November 1, 1943, to on or about August 13, 1945, and since then.

8. Any and all musical records or recordings the plaintiff asserts or claims the defendant played or

broadcast or caused to be played or broadcast between about November 1, 1943, and August 13, 1945, from Radio Tokyo or Radio Station JOAK in Japan.

9. Any and all statements in writing made, executed, signed or initialed by the defendant for the plaintiff or for any agent or agents of the plaintiff or for any other person or persons or asserted or claimed by the plaintiff to have been made by the defendant between Aug. 15, 1945, and Sept. 25, 1948, relating to her life, employment and conduct in Japan from about July 1, 1941, to about September 25, 1948.

10. Any and all oral statements the plaintiff asserts or claims was made by the defendant to the plaintiff or to any agent or agents of the plaintiff or any other person or persons between August 15, 1945, and Sept. 25, 1948, and transcribed or reduced to writing relating to her life, employment and conduct in Japan from about July 1, 1941, to about Sept. 25, 1948.

11. Any and all other records of the plaintiff or U. S. Government departments or agents bearing on this case.

The above-mentioned books, papers, documents and objects are identical with those designated in the subpoena heretofore issued and served upon counsel for the plaintiff.

/s/ WAYNE M. COLLINS,

Attorney for Defendant.

[Endorsed]: Filed June 16, 1949.

[Title of District Court and Cause.]

NOTICE

To Frank J. Hennessy, U. S. Attorney, and Tom DeWolfe, Special Assistant to the Attorney General, Attorneys for plaintiff:

You and each of you will please take notice that on Monday the 20th day of June, 1949, in the Courtroom of the above-entitled Court the defendant will bring on for hearing her motion for production of documentary evidence, her motion for supplemental order authorizing additional subsistence expenses to be paid defendant's counsel for attending examination of witnesses and motion for list of witnesses and veniremen.

/s/ WAYNE M. COLLINS,
Attorney for Defendant.

Receipt of copy acknowledged.

[Endorsed]: Filed June 16, 1949.

[Title of District Court and Cause.]

ORDER GRANTING MOTION FOR SUPPLEMENTAL ORDER AUTHORIZING ADDITIONAL SUBSISTENCE EXPENSES TO BE PAID BY THE GOVERNMENT TO DEFENDANT'S COUNSEL FOR ATTENDING EXAMINATIONS OF WITNESSES

The defendant's motion for supplemental order authorizing additional subsistence expenses to be paid defendant's counsel for attending examinations of witnesses abroad coming on regularly to be heard this 20th day of June, 1949, Wayne M. Collins, Esq., appearing for the defendant, and Frank J. Hennessy, U. S. Attorney, and Tom DeWolfe, Special Assistant to the Attorney General, appearing for the plaintiff, and the matter thereupon being submitted to the Court for decision and being duly considered by the Court, it is ordered that said motion be granted and that the sum of Three Hundred Dollars (\$300.00) be paid to defendant's counsel, Theodore Tamba, Esq., for the thirty (30) day subsistence expenses in addition to that of the subsistence expenses heretofore allowed by order of Court dated March 15, 1949, for attending the examinations and taking of depositions of defendant's witnesses in Japan.

Dated: June 20, 1949.

/s/ MICHAEL J. ROCHE,
U. S. District Judge.

[Endorsed]: Filed June 20, 1949.

District Court of the United States, Northern District of California, Southern Division

At A Stated Term of the District Court of the United States for the Northern District of California, Southern Division, held at the Court Room thereof, in the City and County of San Francisco, on Monday, the 20th day of June, in the year of our Lord one thousand nine hundred and forty-nine. Present: The Honorable Michael J. Roche,
District Judge.

[Title of Cause.]

ORDER

(Order granting motion for additional expenses, etc., motion to quash subpoena duces tecum served on Mr. Hennessy, and motion for list of witnesses and veniremen.)

This case came on for hearing on motion to produce, motion for additional expenses, and motion for lists. Defendant was present in custody of U. S. Marshal. After hearing the arguments of Wayne Collins, Esq., attorney for defendant, and Hon. Frank J. Hennessy, U. S. Attorney, it is Ordered that the motion for additional expenses, etc., be granted; that the motion to quash subpoena duces tecum served on Mr. Hennessy be granted; and that the motion for a list of witnesses and veniremen be granted, said list to be served at least three days prior to the trial. Ordered case continued to June 22, 1949 for hearing on motion to produce.

[Title of District Court and Cause.]

ORDER REQUIRING PLAINTIFF TO SUPPLY DEFENDANT WITH LISTS OF VENIREMEN AND WITNESSES

The motion of the defendant for lists of witnesses and veniremen, filed herein on June 16, 1949, having come on regularly for hearing the 20th day of June, 1949, Wayne M. Collins, Esq., appearing for the defendant, and Frank J. Hennessy, U. S. Attorney, appearing for the plaintiff, and the motion being duly argued and submitted to the Court for decision.

It Is Ordered that the plaintiff or the plaintiff's counsel supply to the defendant or defendant's counsel at least three days before the commencement of the trial herein a list of the veniremen and a list of the witnesses to be produced by the plaintiff on the trial for proving the indictment, stating the place of abode of each venireman and witness.

Dated: June 22nd, 1949.

/s/ MICHAEL J. ROCHE,
U. S. District Judge.

Receipt of copy attached.

[Endorsed]: Filed June 22, 1949.

[Title of District Court and Cause.]

SUBPOENA TO TESTIFY

To: Tom DeWolfe, Special Assistant to the Attorney General, and Frank J. Hennessy, U. S. Attorney.

You are hereby commanded to appear in the District Court of the United States for the Northern District of California at Room 338, Post Office Building in the city of San Francisco, California, on the 5th day of July, 1949, at 10:00 o'clock a.m. to testify in the case of the United States v. Iva Ikuko Toguri d'Aquino.

And bring with you the following:

1. The original, or copies of, letters, radiograms, wireless messages and other written memoranda, including requests, orders, instructions or process of the Attorney General, the Department of Justice or its agents, addressed or sent to the Supreme Commander, Allied Powers (SCAP), Tokyo, Japan, the Commander of the U. S. Eighth Army in Japan, the Counter Intelligence Corps, U. S. Army, in Japan, the Commanding Officer of Sugamo Prison in Tokyo, Japan, the Commanding Officer of Yokohama Prison in Yokohama, Japan, the Secretary of State and Department of State in Washington, and to its consular or other agent or agents in Japan, and replies received thereto from said officers, departments or agents between on or about August 15,

1945, to and including September 25, 1948, complaining of the defendant or directing or requesting the following things: the arrest of the defendant on or about September 5, 1945, at Yokohama, Japan, by agents of the U. S.; her detention there until September 6, 1945, and her then release therefrom; the arrest of the defendant on or about October 16, 1945, at Tokyo, Japan, by agents of the U. S. and her imprisonment by them at the Yokohama Prison in Yokohama, Japan, until November 16, 1945, and thereafter from then to October 25, 1946, at the Sugamo Prison in Tokyo, Japan, and her then release therefrom; her arrest on or about August 26, 1948, at Tokyo, Japan, by agents of the U. S., and imprisonment in Sugamo Prison, Tokyo, Japan, and her transportation therefrom to the S. S. General F. R. Hodges, a U. S. transport vessel, and thence to San Francisco, California, by said vessel which here arrived on September 25, 1948; or relating to any of said things.

2. The original or copies of letters, radiograms, wireless messages and other written memoranda, including requests, orders, instructions or process of the Supreme Commander, Allied Powers (SCAP), Tokyo, Japan, addressed or sent to Tom C. Clark, Attorney General, or the Department of Justice, Washington, D. C., or to the agents of said Department, the Commander of the U. S. Eighth Army in Japan, the Counter Intelligence Corps, U. S. Army, in Japan, the Commanding Officer of Sugamo

Prison in Tokyo, Japan, the Commanding Officer of Yokohama Prison in Yokohama, Japan, the Secretary of State or Department of State in Washington, D. C., and to its consular or other agent or agents in Japan, and replies received thereto from said officers, departments or agents, between on or about August 15, 1945, to and including September 25, 1948, authorizing, directing or requesting the following things: the arrest of the defendant on or about September 5, 1945, at Yokohama, Japan, by agents of the U. S.; her detention there until September 6, 1945, and her then release therefrom; the arrest of the defendant on or about October 16, 1945, at Tokyo, Japan, by agents of the U. S. and her imprisonment by them at the Yokohama Prison in Yokohama, Japan, until November 16, 1945, and thereafter from then to October 25, 1946, at the Sugamo Prison in Tokyo, Japan, and her then release therefrom; her arrest on or about August 26, 1948, at Tokyo, Japan, by agents of the U. S., and imprisonment in Sugamo Prison, Tokyo, Japan, and her transportation therefrom to the S. S. General F. R. Hodges, a U. S. transport vessel, and thence to San Francisco, California, by said vessel which here arrived on September 25, 1948; or relating to any of said things.

3. The original or copies of letters, radiograms, wireless messages and other written memoranda, including requests, orders, instructions and process of the Secretary of State, the Department of State, and also of its consular or other agent or agents in

Japan, addressed or sent to Tom C. Clark, as the Attorney General, or to the Department of Justice or agents of said Department, the Supreme Commander, Allied Powers (SCAP), Tokyo, Japan, the Commander of the U. S. Eighth Army, in Japan, the Counter Intelligence Corps, U. S. Army, Japan, the Commanding Officer of Sugamo Prison in Tokyo, Japan, and the replies received thereto from said officers, departments or agents, between on or about August 15, 1945, to and including September 25, 1948, authorizing, directing or requesting the following things:—the arrest of the defendant on or about September 5, 1945, at Yokohama, Japan, by agents of the U. S.; her detention there until September 6, 1945, and her then release therefrom; the arrest of the defendant on or about October 16, 1945, at Tokyo, Japan, by agents of the U. S. and her imprisonment by them at the Yokohama Prison in Yokohama, Japan, until November 16, 1945, and thereafter from then to October 25, 1946, at the Sugamo Prison in Tokyo, Japan, and her then release therefrom; her arrest on or about August 26, 1948, at Tokyo, Japan, by agents of the U. S., and imprisonment in Sugamo Prison, Tokyo, Japan, and her transportation therefrom to the S. S. General F. R. Hodges, a U. S. transport vessel, and thence to San Francisco, California, by said vessel which here arrived on September 25, 1948; or relating to any of said things.

4. Any and all written charges, accusations or complaints made, brought or filed by authority of

the plaintiff, the United States, including the United States Army, SCAP, the U. S. Eighth Army, the Counter Intelligence Corps of the U. S. Army in Japan, the Attorney General, the Department of Justice, and the State Department in Japan, against the defendant between August 13, 1943, and September 25, 1948, together with any and all records made or kept of any and all examinations, hearings or trials of the defendant had thereon and the disposition made thereof.

5. The original records, or copies thereof, of the Sugamo Prison and Yokohama Prison relating to the defendant which heretofore were delivered or sent to you, the Attorney General or the Department of Justice by the authorized custodian thereof from Japan subsequent to the time in April or May of 1949, when access thereto and examination thereof were denied to Theodore Tamba, Esq., who was acting as counsel for and on behalf of the defendant, and when the taking of the deposition thereon of such custodian by said Theodore Tamba, Esq., relating thereto was refused by such custodian, and, in particular, those records, letters, messages, files, letters, instructions and process relating to the arrests, incarcerations and releases of the defendant from imprisonment as mentioned in paragraphs 1, 2, 3 and 4 hereinabove.

6. Any and all radio script, or copies thereof, the plaintiff asserts or claims was prepared, composed, written, typed, used, read, announced or

broadcast by radio by the defendant between about November 1, 1943, and on or about August 13, 1945, at or from Radio Tokyo, or Radio Station JOAK in Japan.

7. Any and all phonographic recordings the plaintiff asserts or claims to be made of the defendant's voice between about November 1, 1943, to on or about August 13, 1945, and since then.

8. Any and all musical records or recordings the plaintiff asserts or claims the defendant played or broadcast or caused to be played or broadcast between about November 1, 1943, and August 13, 1945, from Radio Tokyo or Radio Station JOAK in Japan.

9. Any and all statements in writing made, executed, signed or initialed by the defendant for the plaintiff or for any agent or agents of the plaintiff or for any other person or persons or asserted or claimed by the plaintiff to have been made by the defendant between Aug. 15, 1945, and Sept. 25, 1948, relating to her life, employment and conduct in Japan from about July 1, 1941, to about September 25, 1948.

10. Any and all oral statements the plaintiff asserts or claims was made by the defendant to the plaintiff or to any agent or agents of the plaintiff or any other person or persons between August 15, 1945, and Sept. 25, 1948, and transcribed or reduced to writing relating to her life, employment and

conduct in Japan from about July 1, 1941, to about Sept. 25, 1948.

11. Any and all other records of the plaintiff or U. S. Government departments or agents bearing on this case.

This subpoena is issued on application of the defendant.

C. W. CALBREATH,
Clerk.

[Seal] By /s/ [Indistinguishable]
Deputy Clerk.

Returns on service of copy attached.

[Endorsed]: Filed June 22, 1949.

District Court of the United States, Northern
District of California, Southern Division

At a Stated Term of the District Court of the United States for the Northern District of California, Southern Division, held at the Court Room thereof, in the City and County of San Francisco, on Wednesday, the 22nd day of June, in the year of our Lord one thousand nine hundred and forty-nine.

Present: The Honorable Michael J. Roche,
District Judge.

[Title of Cause.]

ORDER

(Minute order quashing subpoena duces tecum issued to Mr. DeWolfe;

Minute order denying defendant's motion to produce.)

Case came on for hearing on motion to produce. Defendant was present in custody of U. S. Marshal and with her attorney, Wayne Collins, Esq. Tom DeWolfe, Esq., Special Assistant to the Attorney General, was present for the United States. Mr. DeWolfe made a motion to quash subpoena duces tecum issued to him. After hearing the arguments of the attorneys, it is Ordered that the said motion be granted; and that the defendant's motion to produce be denied.

[Title of District Court and Cause.]

Appearance

Mr. Clerk:

Enter our appearance as attorneys for the defendant in the above-entitled case.

Dated at San Francisco, Cal., on 5th day of July, 1949.

/s/ WAYNE M. COLLINS,

/s/ THEODORE TAMBA,

/s/ GEORGE OLSHAUSEN.

[Endorsed]: Filed July 5, 1949.

District Court of the United States, Northern
District of California, Southern Division

At a Stated Term of the District Court of the United States for the Northern District of California, Southern Division, held at the Court Room thereof, in the City and County of San Francisco, on Friday, the 12th day of August, in the year of our Lord one thousand nine hundred and forty-nine.

Present: The Honorable Michael J. Roche,
District Judge.

[Title of Cause.]

ORDER

(Minute order that oral motion for judgment of acquittal be continued to August 13, 1949.)

The defendant, the attorneys, and the jurors impanelled herein being present as heretofore, the further trial of this case was this day resumed. Robert Cowan, Mariano Villarin, Chas. Hall and Richard Henschel were sworn and testified on behalf of the United States. Mr. De Wolfe introduced in evidence and filed U. S. Exhibit No. 44. The United States then rested. Mr. Olshausen made a motion for judgment of acquittal. It is Ordered that this case be continued to August 13, 1949, at 9:00 a.m., for further trial.

District Court of the United States, Northern
District of California, Southern Division

At a Stated Term of the District Court of the United States for the Northern District of California, Southern Division, held at the Court Room thereof, in the City and County of San Francisco, on Saturday, the 13th day of August, in the year of our Lord one thousand nine hundred and forty-nine.

Present: The Honorable Michael J. Roche,
District Judge.

[Title of Cause.]

ORDER

(Minute order denying defendant's motion for judgment of acquittal.)

The defendant and the attorneys being present as heretofore, the further trial of this case was this day resumed. The jurors were not present. The Court proceeded to hear the arguments on the defendant's motion for a judgment of acquittal. After hearing the arguments of Mr. Olshausen and Mr. De Wolfe, it is Ordered that said motion be denied. It is Ordered that this case be continued to August 15, 1949, at 10 a.m., for further trial.

[Title of District Court and Cause.]

MOTION FOR ORDER FOR PRODUCTION,
EXAMINATION AND INSPECTION OF
RECORDS AND SCRIPTS

Defendant, supplementing her oral motions heretofore made during the course of the prosecution's case, moves for the order of this Court requiring the plaintiff to produce in court and to permit the defendant to examine and inspect the following:

1. The five phonographic recordings to which the prosecution's witness Sam Cavanar testified to on his direct examination, commencing on line 16 of page 2226 down to and including line 4 on page 2227 of the reporter's transcript, Vol. XXI, of August 3, 1949, and on line 7 of page 2227 thereof down to and including the material on line 15 thereof on cross-examination.

2. The five phonographic recordings to which the prosecution's witness William Halbert Thompson testified to on his direct examination, commencing on line 18 of page 2250 down to and including the material on line 9 on page 2251 of the reporter's transcript, Vol. XXI, of August 3, 1949, and the material mentioned on line 15 of page 2273 of said transcript down to and including the material on line 8 of page 2274 thereof relating to the cross-examination of said witness.

3. The five phonographic recordings of programs of the Zero Hour program, or parts thereof, deliv-

ered into the possession of the plaintiff, or its agent Fred Tillman or agents of the plaintiff in Japan during the latter part of 1948 or during the early part of 1949 by Ruth Hayakawa.

4. The radio scripts and the motion picture, together with its sound recording tract, insofar as the said motion picture incorporates the said radio scripts of the defendant to which the witness Robert Cowan testified on August 12, 1949, on his direct examination, at pages 2810, line 16 to 24, inclusive, page 2824, lines 17 to 25 inclusive, page 2825, lines 1 to 3, inclusive, page 2827, lines 5 to 25 inclusive and page 2828, lines 1 to 3 inclusive on his cross-examination, said page and line references appearing in the reporter's transcript of the trial herein on August 12, 1949, transcript No. XXVI.

Dated: August 13, 1949.

/s/ WAYNE M. COLLINS,
/s/ GEORGE OLSHAUSEN,
/s/ THEODORE TAMBA,
Attorneys for Defendant.

Receipt of copy acknowledged.

[Endorsed]: Filed August 13, 1949.

District Court of the United States, Northern
District of California, Southern Division

At a Stated Term of the District Court of the United States for the Northern District of California, Southern Division, held at the Court Room thereof, in the City and County of San Francisco, on Monday, the 19th day of September, in the year of our Lord one thousand nine hundred and forty-nine.

Present: The Honorable Michael J. Roche,
District Judge.

[Title of Cause.]

ORDER

(Minute order denying motion to strike certain testimony; to strike U. S. Exhibits Nos. 2 and 15; to dismiss Indictment; and motion for acquittal.)

The defendant, the attorneys and the jurors impanelled herein being present as heretofore, the further trial of this case was this day resumed. Frances Roth, Rafael Velasquez, Sr., and Rafael Velasquez, Jr., were sworn and testified on behalf of the United States. Mr. Knapp introduced in evidence and filed U. S. Exhibits Nos. 63-75. The United States rested its case in rebuttal. Both sides rested. The attorneys for the defendant made the following motions: to strike certain testimony; to strike U. S. Exhibits numbered 2 and 15; to dismiss

the indictment; and motion for acquittal. After hearing the arguments of the attorneys, it is Ordered that each of said motions be denied. It is Ordered that this case be continued to September 20, 1949, at 10 o'clock a.m. for further trial, and the jury after being duly admonished by the Court was excused until said time.

District Court of the United States, Northern
District of California, Southern Division

At a Stated Term of the District Court of the United States for the Northern District of California, Southern Division, held at the Court Room thereof, in the City and County of San Francisco, on Monday, the 26th day of September, in the year of our Lord one thousand nine hundred and forty-nine.

Present: The Honorable Michael J. Roche,
District Judge.

[Title of Cause.]

ORDER

(Minute Order re: Court's instruction to jury; Aileen McNamara, alternate juror, excused from further service; Marshal instructed to provide meals and lodging for jurors and two deputy marshals, etc.)

The defendant, the attorneys, and the jurors impanelled herein being present as heretofore, further

trial of this case was this day resumed. After hearing the instructions of the Court, the jury at 11:43 a.m. retired to deliberate upon its verdict. It is Ordered that alternate juror Aileen McNamara be excused from further service. It is Ordered that the U. S. Marshal furnish meals and lodgings for the jurors and two Deputy Marshals. At 2:41 p.m. the jury returned into the Courtroom, requested and received the written instructions of the Court, by stipulation. At 2:44 p.m. the jury again retired to deliberate upon its verdict. At 11:20 p.m. the jury retired for the night. Ordered case continued to September 27, 1949, for further trial.

District Court of the United States, Northern
District of California, Southern Division

At A Stated Term of the District Court of the United States for the Northern District of California, Southern Division, held at the Court Room thereof, in the City and County of San Francisco, on Tuesday, the 27th day of September, in the year of our Lord one thousand nine hundred and forty-nine.

Present: The Honorable Michael J. Roche,
District Judge.

[Title of Cause.]

ORDER

(Minute order—re portions of transcript and exhibit requested by and delivered to jury; etc.)

The defendant, the attorneys, and the jurors impanelled herein being present as heretofore, the further trial of this case was this day resumed. At 11:42 a.m. the jury returned into Court, requested and received certain portions of the transcript. At 11:46 a.m. the jury again retired to deliberate upon its verdict. At 2:35 p.m. the jury returned into Court, requested and received certain portions of the transcript. At 2:36 p.m. the jury again retired to deliberate upon its verdict. At 3:56 p.m. the jury returned into Court, requested and received U. S. Exhibit No. 15. At 3:58 p.m. the jury again retired to deliberate upon its verdict. At 10:15 p.m. the jury retired for the night. Ordered case continued to September 28, 1949, for further trial.

District Court of the United States, Northern
District of California, Southern Division

At a Stated Term of the District Court of the United States for the Northern District of California, Southern Division, held at the Court Room thereof, in the City and County of San Francisco,

on Thursday, the 29th day of September, in the year of our Lord one thousand nine hundred and forty-nine.

Present: The Honorable Michael J. Roche,
District Judge.

[Title of Cause.]

ORDER

(Minute order—re Jury requesting and receiving certain volumes of testimony, and further instructions of the Court; Jury's verdict and Special Findings, etc.)

The defendant, the attorneys, and the jury impaneled herein being present as heretofore, the further trial of this case was this day resumed. At 11:40 a.m. the jury returned into Court, requested and received certain volumes of testimony. At 11:43 a.m. the jury again retired to deliberate upon its verdict. At 5:38 p.m. the jury returned into Court, requested and received further instructions. At 5:40 p.m. the jury again retired to deliberate upon its verdict. At 6:04 p.m. the jury returned into Court and upon being asked if they had agreed upon a verdict, replied in the affirmative and returned the following verdict and Special Findings which were ordered filed and recorded:

“We, the Jury, find as to the defendant at the bar as follows: Guilty.

s/ JOHN MANN,
Foreman.”

“Special Findings by the Jury

In accordance with the instruction already given by the Court, the jury makes the following findings:

I.

Did the jury find overt act 1., as it is laid in the indictment, a treasonable act committed by the defendant D'Aquino with an intent to betray the United States? (Answer, in writing, yes or no.)

No

II.

Did the jury find overt act 2., as it is laid in the indictment, a treasonable act committed by the defendant D'Aquino with an intent to betray the United States? (Answer, in writing, yes or no.)

No

III.

Did the jury find overt act 3., as it is laid in the indictment, a treasonable act committed by the defendant D'Aquino with an intent to betray the United States? (Answer, in writing, yes or no.)

No

IV.

Did the jury find overt act 4., as it is laid in the indictment, a treasonable act committed by the defendant D'Aquino with an intent to betray the United States? (Answer, in writing, yes or no.)

No

V.

Did the jury find overt act 5., as it is laid in the indictment, a treasonable act committed by the

defendant D'Aquino with an intent to betray the United States? (Answer, in writing, yes or no.)

No

VI.

Did the jury find overt act 6., as it is laid in the indictment, a treasonable act committed by the defendant D'Aquino with an intent to betray the United States? (Answer, in writing, yes or no.)

Yes

VII.

Did the jury find overt act 7., as it is laid in the indictment, a treasonable act committed by the defendant D'Aquino with an intent to betray the United States? (Answer, in writing, yes or no.)

No

VIII.

Did the jury find overt act 8., as it is laid in the indictment, a treasonable act committed by the defendant D'Aquino with an intent to betray the United States? (Answer, in writing, yes or no.)

No

San Francisco, California,
Sept. 29, 1949.

/s/ JOHN MANN,
Foreman."

The jury upon being asked if said verdict and Special Findings were its verdict and Special Findings, each juror replied that it was. The jury was polled. Ordered that the jury be discharged from further consideration hereof and be excused. On

motion of Mr. Collins, it is ordered that this case be continued to October 6, 1949, for judgment.

[Title of District Court and Cause.]

SPECIAL FINDINGS BY THE JURY

In accordance with the instruction already given by the Court, the jury makes the following findings:

I.

Did the jury find overt act 1., as it is laid in the indictment, a treasonable act committed by the defendant D'Aquino with an intent to betray the United States? (Answer, in writing, yes or no.)

No

II.

Did the jury find overt act 2., as it is laid in the indictment, a treasonable act committed by the defendant D'Aquino with an intent to betray the United States? (Answer, in writing, yes or no.)

No

III.

Did the jury find overt act 3., as it is laid in the indictment, a treasonable act committed by the defendant D'Aquino with an intent to betray the United States? (Answer, in writing, yes or no.)

No

IV.

Did the jury find overt act 4., as it is laid in the indictment, a treasonable act committed by the

defendant D'Aquino with an intent to betray the United States? (Answer, in writing, yes or no.)

No

V.

Did the jury find overt act 5., as it is laid in the indictment, a treasonable act committed by the defendant D'Aquino with an intent to betray the United States? (Answer, in writing, yes or no.)

No

VI.

Did the jury find overt act 6., as it is laid in the indictment, a treasonable act committed by the defendant D'Aquino with an intent to betray the United States? (Answer, in writing, yes or no.)

Yes

VII.

Did the jury find overt act 7., as it is laid in the indictment, a treasonable act committed by the defendant D'Aquino with an intent to betray the United States? (Answer, in writing, yes or no.)

No

VIII.

Did the jury find overt act 8., as it is laid in the indictment, a treasonable act committed by the defendant D'Aquino with an intent to betray the United States? (Answer, in writing, yes or no.)

No

San Francisco, California, Sept. 29, 1949.

/s/ JOHN MANN,

Foreman.

[Endorsed]: Filed September 29, 1949.

In the Southern Division of the United States
District Court for the Northern District of
California, First Division

No. 31712-R

THE UNITED STATES OF AMERICA

vs.

IVA IKUKO TOGURI D'AQUINO

VERDICT

We, the Jury, find as to the defendant at the bar
as follows:

Guilty.

/s/ JOHN MANN,
Foreman.

[Endorsed]: Filed September 29, 1949.

[Title of District Court and Cause.]

MOTION FOR ARREST OF JUDGMENT
UNDER RULE 34

Defendant moves the court for an order arresting judgment under Rule 34 of the Rules of Criminal Procedure for the District Courts of the United States upon each of the following grounds:

1. The indictment does not state a public offense.
2. The court is without jurisdiction of the offense charged upon the ground that the Northern District of California is not the District to which defendant was first brought; on the contrary, the first territory under American jurisdiction to which defendant was first brought was the Island of Okinawa.
3. The court has no jurisdiction of the offense upon the ground that the indictment was based upon perjured and suborned testimony.
4. The court has no jurisdiction over the person of the defendant.

/s/ WAYNE M. COLLINS,
/s/ GEORGE OLSHAUSEN,
/s/ THEODORE TAMBA,

Receipt of copy attached.

[Endorsed]: Filed October 3, 1949.

[Title of District Court and Cause.]

MOTION FOR ACQUITTAL OR NEW TRIAL
UNDER RULE 29 (b)

Defendant hereby moves the court to set aside the verdict of guilty heretofore entered and to enter a judgment of acquittal or alternatively to grant a new trial under Rule 29(b) of the Rules of Criminal Procedure for the District Courts of the United States. Said motion will be made upon the ground that the evidence is insufficient to sustain the verdict of guilty and in particular is deficient upon each of the following grounds, among others:

1. Defendant's imprisonment in Japan upon suspicion of treason from September, 1945, until October, 1946, and her release on the latter date, if construed as arrest and release upon the charges contained in the indictment, show that the question of defendant's guilt or innocence has previously been passed upon and is now *res judicata* or that defendant has been once put in jeopardy. If construed as not based upon charges, said imprisonment for more than one year without charges after an arrest on suspicion of treason constituted a denial of a speedy trial in violation of Amendment VI to the United States Constitution.

2. The said imprisonment of the defendant for more than one year in Japan on suspicion of treason but without filing of charges coupled with the loss of material evidence as testified to by witness Rob-

ert Cowan constituted a denial of the right of a speedy trial in violation of Amendment VI to the U. S. Constitution.

3. Prosecution of defendant upon partial evidence after known loss of evidence by agents of the government as testified to by witness Robert Cowan constitutes denial of due process of law in violation of Amendment V to the U. S. Constitution.

4. Playing of the recordings contained in Exhibits 16 to 21 with earphones only for a judge, jury, defendant, counsel and members of the press but not for the public spectators so that such playing was inaudible to the public constituted denial of a public trial to the defendant in violation of Amendment VI to the U. S. Constitution.

5. Withholding by the government of the reports of witnesses Frederick G. Tillman and John Eldon Dunn of their interviews with Norman Reyes after the said witnesses have given direct testimony on this subject on rebuttal when such report was otherwise properly within the scope of the cross-examination of said witnesses constitutes a denial of due process of law in violation of Amendment V to the U. S. Constitution.

6. The uncontradicted evidence from the witnesses of both prosecution and defense that the defendant brought food, tobacco and medicines to the Allied prisoners of war creates a reasonable doubt

upon the issue of intent which must be declared by the court.

/s/ WAYNE M. COLLINS,
/s/ GEORGE OLSHAUSEN,
/s/ THEODORE TAMBA,

Points and Authorities:

U. S. v. McWilliams, 163 Fed. (2d) 695.

Curley v. U. S., 160 Fed. (2d) 229.

Receipt of copy attached.

[Endorsed]: Filed October 3, 1949.

[Title of District Court and Cause.]

MOTION FOR NEW TRIAL
UNDER RULE 33

Defendant moves the court to set aside the verdict of guilty heretofore entered and to grant a new trial under Rule 33 of the Rules of Criminal Procedure for the District Courts of the United States upon each of the following grounds:

A. Errors of law in rulings on evidence excepted to by defendant.

B. Errors of law in the giving and refusal of instructions excepted to by defendant.

C. Misconduct of the prosecuting attorney excepted to by defendant.

Said grounds will include but will not be limited to the following:

1. The court erred in admitting Exhibit 24.
2. The court erred in admitting Exhibits 2 and 15.
3. The court erred in admitting fragmentary testimony upon the issue of intent which was offered by the Government in a way so as to make it impossible for defendant to show the context. In particular, the court erred in admitting Exhibits 16 to 21, 25 and the testimony of each of the following witnesses:

Gilbert V. Velasquez

Ted Sherdeman

Jules I. Sutter

Marshall Hoot

Sam Cavanar

William Halbert Thompson

David I. Gilmore

Robert Cowan

Charles F. Hall

Richard Henschel

Hishashi Moriyama

George Hideo Mitsushio ("cold water sure tastes good," etc.)

Shinjiro Igarashi

Motomu Nii

Mary Higuchi (second appearance)

Mariano S. Villarin

4. The giving of Instruction No. 22 telling the jury as a matter of law that Satoshi Nakamura was a witness to Overt Act 6.

5. Misstatement of the record in the argument of the prosecuting attorney in stating that Clark Lee testified to an alleged admission with respect to Overt Act No. 6.

6. Error in permitting cross-examination of the defendant relative to the truth or falsity of other witnesses.

7. Exclusion of evidence of duress upon persons other than defendant and of evidence of consequence of disobedience of Army orders.

8. Errors in permitting cross-examination of defendant with respect to Overt Act 8 on which defendant had not testified which was used as the basis for impeaching evidence and later used in the argument of the prosecution to impeach defendant's entire testimony.

9. Misconduct of the prosecutor in his argument to the jury in misstating testimony of F. Harris Sugiyama.

10. Misconduct of the prosecuting attorney in his argument to the jury in using Exhibit 52 as affirmative evidence rather than merely going to the impeachment of the witness, Norman Reyes, and failure of the court to give a limiting instruction when requested to do so at the time of the argument.

11. Exclusion of evidence as to the nature of the program broadcast by Myrtle Liston from Manila from the depositions of the witness Ken Murayama.

12. Exclusion of evidence tendered by the defendant as to the nature of broadcasts at hours other than 6:00 to 7:00 p.m., Tokyo time, after the prosecution had been permitted to show the contents of alleged broadcasts ranging on Tokyo time from 3:00 p.m. until midnight.

13. Repeated refusal by the court to permit defendant to make offers of proof after objections sustained to questions put to defendant's witnesses on direct examination.

14. Error in permitting questions calling for conclusions in the cross-examination of Norman Reyes.

15. Error in permitting questions calling for conclusions in the cross-examination of the defendant.

16. Exclusion of defendant's exhibit number BU for identification making the Geneva Convention applicable during World War II as between the United States and Japan both to prisoners of war and to interned civilians.

17. Error in refusing defendant's requested instructions relating to the Geneva Convention.

18. Exclusion of defendant's exhibit for identi-

fication BQ and BR, (Harry Brundidge's travel orders and passport).

19. Exclusion of those parts of the deposition of the witness Toshi Katsu Kodaira relating to the activities of Harry Brundidge in bribing or attempting to bribe witnesses against the defendant.

20. Exclusion of defendant's exhibit BT for identification (government subpoenas).

21. Exclusion of the testimony of the witness Kamini Kant Gupta to the effect that Army authorities considered the Zero Hour program a morale building program for the American troops.

22. Exclusion of defendant's exhibit BV for identification (Navy citation).

23. Refusal of each of the following instructions requested by defendant: 30A, 38, 39, 48, 49, 50, 65, 70, 71, 74, 75, 76, 79, 84, 85, 88, 92 to 104, 106 to 109, 110, 111, 112 to 138, 140, 139, 155, 156, 157, 161 to 169.

24. The giving of each of the following instructions (court's numbering) on the grounds heretofore specified in exceptions to the instructions: 8, 19, 25, 27, 38, 44, 45, 47, 50, 57.

25. Misconduct of the prosecuting attorney in arguing to the jury that this case should be a warning to others and that there may be other prosecutions.

26. Misconduct of the prosecuting attorney in sneering, bullying cross-examination, misstating the record to witnesses.

/s/ WAYNE M. COLLINS,
/s/ GEORGE OLSHAUSEN,
/s/ THEODORE TAMBA,

Receipt of copy attached.

[Endorsed]: Filed October 3, 1949.

[Title of District Court and Cause.]

POINTS AND AUTHORITIES IN SUPPORT
OF MOTION FOR NEW TRIAL UNDER
RULE 33

The following points are numbered to correspond with the numbers of the grounds for the motion:

1.

Exhibit N shows that at the time Exhibit 24 was taken, defendant had been in custody from September, 1945, to April, 1946; that she was released by the Army and turned over to agent Frederick G. Tillman for the purposes of interrogation. A statement taken while defendant is held for the purposes of interrogation after only six days of confinement is inadmissible. *Upshaw v. U. S.*, 335 U. S. 410, 93 L. Ed. Adv. Ops. 129 (reversed for that error alone).

4.

Instruction No. 22 told the jury categorically that Nakamura was a witness to Overt Act No. 6, instead of leaving it to the jury to decide whether or not he was testifying to the same incident as that described by Oki and Mitsushio.

Gardner v. Babcock, 70 U. S. 240, 18 L. Ed. 31, 33.

"The court could not tell the jury that any legal results followed from the evidence which only tended to prove the issue to be tried." [Emphasis added.]

It was therefore error to withdraw the question from the jury whether Nakamura was testifying to the same or a different incident.

5.

Overt Act No. 6 concerned the battle of Leyte Gulf (Oki IX—680-81, Mitsushio XI—971, 974). Clark Lee testified about a fighter sweep off Formosa (VII—485, VIII—572). His is not testimony "to the same overt act." In the oral argument, however, the U. S. attorney named Clark Lee as a corroborating witness to Overt Act 6 (the argument has not yet been transcribed) clearly misstating the record. Exception was taken (LIV—5940)—but the same argument was repeated later. The jury then requested leave to "examine . . . the transcripts of the testimony of the following relative to Overt Acts 5 and 6: Clark Lee, Oki, Mitsushio" (LIV—6001) showing they had been influenced by the prosecutor's misstatement of the record. They re-

ported themselves unable to agree but ultimately convicted on Overt Act 6 alone. Statements of the prosecution outside or contrary to the record are in themselves reversible error. *Taliaferro v. U. S.*, 47 Fed. (2d) 699 (CCA9), followed in *Minker v. U. S.*, 85 Fed. (2d) 425, 426-7 (CCA 3). See also *Berger v. U. S.*, 295 U. S. 78, 84, 79 L. Ed., 1314, 1319 (Misstatement of evidence in questions).

6.

The defendant was repeatedly asked to characterize the testimony of other witnesses as "accurate," "true," "false" or "in error" XLVII—5249, 5258-9, 5301-2, XLIX—5405-6, 5428 (in effect), 5436-7, (Overt Act 6).

At the following places the characterization of another witness's testimony was insinuated:

XLVIII—5368-9, 5371-2, 5375-7, 5381.

XLIX—5396-7, 5403-4, 5407, 5451-2, 5455-6, 5458-67, 5474-5, 5477, 5490-91.

Such cross-examination is improper. *State v. Schleifer*, 102 Conn. 708, 130 Atl. 184, 191; *State v. Bradley*, 134 Conn. 102, 55 Atl. (2d) 114, 120; *Williams v. State*, 17 SW (2d) 56, 58, (Tex. App.); *Temple v. Duran*, 121 SW 253, 255 (Tex. App.). See also *McDowell v. U. S.*, 74 Fed. 403, 407 (improper to cross-examine on another person's statement). It may constitute prejudicial error (*State v. Schleifer*, 130 Atl., 184, 191 *supra*). In the present case it was undoubtedly prejudicial because of its frequent repetition and because it was used spe-

cifically respecting Overt Act 6 (XLIV—5436-7). Where objections to a line of questions are repeatedly overruled, it is not necessary to object to every question. *Wilson v. U. S.*, 4 Fed. (2d) 888, 889. At XLVIII—5377 the court stated that it had repeatedly overruled objections to these questions.

8.

Defendant gave no direct testimony on Overt Act No. 8. Nevertheless she was cross-examined upon it (XLIX—5440-5446). Her answers were used as basis for impeachment by the witness Roth and Exhibit 63 (LII—5852). On argument this evidence was then used to impeach defendant's entire testimony. A defendant testifying to only one part of a charge, cannot be cross-examined on another part. *Tucker v. U. S.*, 5 Fed. (2d) 818, 822, 824. Defendant having given no direct testimony on Overt Act 8, could not be cross-examined regarding it. Since the sequel of the cross-examination was used in argument to impeach defendant's entire testimony, the error is prejudicial despite the acquittal on Overt Act 8.

9.

The testimony of Sugiyama was misstated to change its sense. Exception taken LIV—5490, misconduct within the principle of *Taliaferro v. U. S.*, 47 Fed. (2d) 699, *supra*; *Berger v. U. S.*, 295 U. S. 78, *supra*.

10.

Exhibit 52 was limited to impeachment of the credibility of witness Reyes (XXXIII—3779). On

the oral argument this exhibit was repeatedly used as proving facts in the case. We twice requested instructions that it could not be used that way (LIV—5939, 5941). In neither instance was the requested instruction given. Misconduct falls within principle of *Taliaferro v. U. S.* and *Berger v. U. S.*

11-12.

The prosecution offered evidence of broadcasts ranging on Tokyo time from 3:00 p.m. (Hoot XX—2136-7, 2142—Gilbert Islands 6:00-7:00 p.m.) to midnight (Herschel XXVI—2960, 2988—Leyte, 9:00-11:00 p.m.). See in this connection defendant's Exhibit T, world time map.

The defense, however, was limited to rebuttal testimony covering only the hour 6:00-7:00 p.m., Tokyo time. See parts re Myrtle Liston, excluded from Ken Murayama's deposition, (XLIII—4727-8) and the following: Schenk XXXVI—4060-61; Matsui XXXVI—4126-30, 4143-4; Cox XXXVII—4264-5; Welker XXXVIII—4387-98; Hagedorn XXXVIII—4412-4424, 4337 (defendant's Exhibit Z for identification); Gallagher XXXIX—4376-7, 4380-85.

13.

An offer of proof must be made after objection sustained to a question on direct examination. See 1 *Widmore on Evidence* (3rd ed.) sec. 20, pp. 361 ff., *Rules Crim. Proc.* 26, adopting the common law; also *Rules Civ. Proc.* 43 (c). Defendant proposed making offers of proof in absence of jury, XXXVII—4291-2. Opportunity to make offers of proof was

denied at the following places: XXXV—3957-8 (Reyes), XXXVIII—4293-4303; (Kalbfleisch) XXXIX—4341-2 (Stanley). Where the defendant is thus prevented from completing a record to show prejudice, it is reversible error. Compare *People v. Sarrazawski*, 27 Cal. (2d) 7, 161 Pac. (2d) 934; *People v. Stevanson*, 103 Cal. App. 82, 284 Pac. 487.

25.

Exception taken LIV—5939, 5941. *Turk v. U. S.*, 20 Fed. (2d) 129, holds similar argument reversible error even after instruction to disregard.

26.

In cross-examination of defendant: XLVIII—5256-7 (distorting testimony of government witness Kuroishi, XXI—2280-85); XLVIII—5385; XLIX—5394-5, 5401 (attempting to make defendant deny facts previously testified to by government witness Tsuneishi, IV—251, VI—412); XLIX—5458-9 (misstatement of Cousens' testimony XXX—3432-3); L—5540-44 (attempting to make defendant deny facts already in evidence as Government Exhibit 9. This line of examination begins with the sneer "You talk, Mrs. d'Aquino, about filing applications for re-establishment of your American citizenship"—L—5540); XLVII—5310 (attempting to make defendant deny facts previously testified to by government witness Tsuneishi, V—321).

This type of misconduct is covered by *Berger v. U. S.*, 295, U. S. 78, 84.

Respectfully submitted,

/s/ WAYNE M. COLLINS,

/s/ GEORGE OLSHAUSEN,

/s/ THEODORE TAMBA.

Receipt of copy attached.

[Endorsed]: Filed October 3, 1949.

[Title of District Court and Cause.]

SUPPLEMENTAL GROUND IN SUPPORT
OF MOTION HERETOFORE FILED FOR
ACQUITTAL OR NEW TRIAL UNDER
RULE 29 (b)

7. The prosecution of defendant while instituting no prosecution against government witnesses Mitsushio and Moriyama who claimed to have become Japanese citizens in 1942 when it was impossible to do so and who according to their own testimony participated on the same program as defendant was a denial of equal protection guaranteed by Amendment V to the United States Constitution and elaborated in *Yick Wo vs. Hopkins*, 118 U. S. 356.

/s/ WAYNE M. COLLINS,

/s/ GEORGE OLSHAUSEN,

/s/ THEODORE TAMBA.

Receipt of copy attached.

[Endorsed]: Filed October 5, 1949.

[Title of District Court and Cause.]

SUPPLEMENTAL AUTHORITIES ON
MOTION FOR NEW TRIAL UNDER RULE 33

1. *Bram v. U. S.*, 168 U. S. 532, 541—statement of accused made to officers is to be treated as confession regardless of whether it is partly exculpatory.

Followed in *Ashcraft v. Tenn.*, 327 U. S. 274, 278, 90 L. Ed. 667, 670.

2. *Pierce v. U. S.*, 86 Fed. (2d) 949, 953—speaking of prejudicial suggestions by prosecutor “that it was intended to prejudice the jury is sufficient ground for a conclusion that in fact it did so.” (Judgment reversed despite trial court’s instruction to disregard.)

Beck v. U. S., 33 Fed. (2d), 107, 114—prosecutor’s questions leaving impressions “not intended by the witness.”

U. S. v. Nettl, 121 Fed. (2d), 927, 930—questions assuming the existence of damaging facts; alleged good motive of prosecutor immaterial.

3. Exhibit 63 was not offered to rebut claim of no propaganda on program (as stated by counsel for prosecution on oral argument on this motion); the exhibit offered for that purpose was No. 75 (Vol LII, p. 5859).

4. Rule 43 (c) of Civil Procedure does not give the judge discretion to reject an offer of proof; it

gives him discretion only (a) to require the offer to be made out of the presence of the jury, or (b) to add to the offer.

/s/ WAYNE M. COLLINS,
/s/ GEORGE OLSHAUSEN,
/s/ THEODORE TAMBA.

Receipt of copy attached.

[Endorsed]: Filed October 6, 1949.

[Title of District Court and Cause.]

MEMORANDUM ON BEHALF OF UNITED
STATES IN OPPOSITION TO DEFEND-
ANT'S MOTIONS FOR A NEW TRIAL,
JUDGMENT OF ACQUITTAL, AND IN
ARREST OF JUDGMENT.

Motion In Arrest Of Judgment

Matter alleged as ground in arrest of judgment must be such as would have been sufficient on motion to dismiss. *Hillegas v. U. S.*, 183 F. 199, cert. den. 219 U. S. 585, 55 L. ed. 347; *U. S. v. Maxey*, 200 F. 997. The motion must be based on matters appearing in the record which does not include the evidence or the charge. *Horwitz v. U. S.*, 5 F. 2d 129; *Demolli v. U. S.*, 144 F. 363; *Loewenthal v. U. S.*, 274 F. 563. Plainly, the general rule is that judgment in a criminal case will, after conviction, be arrested only for matters appearing of record which

would render the judgment, if entered, erroneous; the evidence being no part of the record for such purpose. *Horwitz v. U. S.*, 5 F. 2d 129, 131.

Defects in the indictment must be substantial, and not of form; the latter are deemed to be cured by the verdict. *F. R. Crim. P.* 52; *Hall v. U. S.*, 277 F. 19; *Gibson v. U. S.*, 31 F. 2d 19, cert. den. 279 U. S. 866, 73 L. ed. 1004; *Brewer v. U. S.*, 290 F. 807; *Gay v. U. S.*, 12 F. 2d 433. A motion in arrest will not lie for failure to prove venue. *Piacenza v. U. S.*, 293 F. 164.

Motion For Judgment Of Acquittal

The weight of conflicting evidence is not for this court. The question is the sufficiency of the Government's evidence to go to the jury and to sustain the verdict. *May v. U. S.*, 175 F. 2d 994, 1007. There being substantial evidence in support of the indictment, the court would err if it granted defendant's motion for judgment of acquittal. *Pierce v. U. S.*, 252 U. S. 239, 251, 252, 64 L. ed. 542. The question whether the effect of the evidence was such as to overcome any reasonable doubt of guilt was for the jury, not the court, to decide. *Pierce v. U. S.*, 252 U. S. 239, 251, 252, 64 L. ed. 542. On a motion for judgment of acquittal, previously known as a motion for an instructed verdict, the court is required to approach the evidence from a standpoint most favorable to the Government, and to assume the truth of the evidence adduced in support of the indictment. If on this basis there is substan-

tial evidence justifying an inference of guilt, irrespective of any countervailing testimony that may have been introduced, the motion for judgment of acquittal, if interposed prior or subsequent to verdict, must be denied, as a factual jury question only is involved. *U. S. v. Robinson*, 71 F. Supp. 9; *Curley v. U. S.*, 160 F. 2d 229; *F. R. Crim. P.* 29.

Motion For New Trial

The grant or denial of a motion for new trial rests in the sound discretion of the federal trial jurist, and your Honor's denial of defendant's motion is not reviewable in the absence of a clear showing of an abuse of discretion. *Mattox v. U. S.*, 146 U. S. 140, 36 L. ed. 917.

Conclusion

The post-trial motions should be denied.

Respectfully submitted,

/s/ FRANK J. HENNESSY,

United States Attorney.

/s/ TOM DeWOLFE,

/s/ JAMES W. KNAPP,

Special Assistants to the
Attorney General.

[Endorsed], Filed October 6, 1949.

DEFENDANT'S PROPOSED INSTRUCTIONS

(These instructions have been covered by the Court in other instructions. Defendant Excepts on the ground they have not been so covered.)

Defendant's Proposed Instruction No. 19

The jury are the sole judges of the credibility of and the weight which is to be given to the testimony of the witnesses testifying at this trial. In weighing the testimony of each witness they should give it careful scrutiny and consider all the circumstances under which the witness testified; his or her demeanor on the stand; the relation which he or she bears to the government; his or her apparent candor and fairness, or lack thereof; the reasonableness or unreasonableness of his or her story; the extent to which he or she is corroborated or contradicted by other credible evidence; and in short, any circumstances that tend to throw light upon his or her credibility.

United States v. Haupt, 47 F. Supp. 836, 840.

Defendant's Proposed Instruction No. 21

In order to justify a verdict of guilty based in part upon circumstantial evidence, the facts in the chain of circumstances relied upon must be consistent with the guilt of the accused, and inconsistent with every reasonable supposition of innocence. If the facts and circumstances shown by the evidence are as consistent with innocence as with

guilt, the jury should acquit the accused. As I shall instruct you hereafter, there are certain phases of the case for which circumstantial evidence is insufficient in law and on which the government is required to offer direct evidence. On all such issues you must find for the defendant if you find that the government has failed to produce the legally required amount of direct evidence.

Modeled on instruction 7-A in *U. S. v. Kawakita*, Crim. No. 19,665, U.S.D.C., S.D. Cal., Cen. Div.

Defendant's Proposed Instruction No. 27

The defendant, Iva Ikuko Toguri d'Aquino, is not charged with levying war against the United States, so it is not necessary to consider here that aspect of the crime of treason.

The alleged treason charged in the indictment is that the defendant adhered to the enemies of the United States, giving them aid and comfort in Japan.

Modeled on instruction 11-A given in *U. S. v. Kawakita*, Crim. No. 19,665, U.S.D.C., S.D. Cal., Cen. Div.

Defendant's Proposed Instruction No. 28

The crime of treason for the purposes of this case consists of two elements: adherence to the enemy, and rendering him aid and comfort.

Cramer v. United States, 325 U. S. 1, 29.

Defendant's Proposed Instruction No. 33

The fourth essential element of the charge in the indictment is the allegation:

That the overt act or acts so committed by the defendant actually gave aid and comfort to the enemies of the United States, to wit, the Government of Japan.

An overt act may not serve as a basis for conviction of the crime of treason unless the act be treasonable in character. That is to say, the overt act must be an act which "really was aid and comfort to the enemy."

In the words of the United States Supreme Court in the case of *United States v. Cramer*, decided April 23, 1945 (325 U. S. 1, 34):

"The very minimum function that an overt act must perform in a treason prosecution is that it show sufficient action by the accused, in its setting, to sustain a finding that the accused actually gave aid and comfort to the enemy."

Thus the character of the overt act must be judged in its setting, in the light of any related facts and events, in the light of all surrounding circumstances as shown by all the evidence. Overt acts of related events, may turn out to be acts which were not of aid or comfort to the enemy.

Modeled on instruction 11-0 given in *U. S. v. Kawakita*, Crim. No. 19,665, U.S.D.C., S.D. Cal., Cen. Div.

Defendant's Proposed Instruction No. 36

The seventh and eighth essential elements of the charge set forth in the indictment are:

That such overt act or acts of treason were so committed at or near Radio Tokyo on the Island of Honshu, Japan, outside the jurisdiction of any particular state or district of the United States; and that the Northern District of California is the district of the United States where the defendant was thereafter first brought.

The burden is upon the prosecution to prove beyond reasonable doubt those facts in order to show that this court—the United States District Court for the Northern District of California—is the place provided by law for the trial of the defendant for the offense of treason charged.

Article III, Sec. 2 of the Constitution of the United States provides that: "The Trial of all crimes . . . shall be held in the State where the said Crimes shall have been committed; but when not committed within any State, the Trial shall be at such Place or Places as the Congress may by Law have directed."

Pursuant to the power thus conferred by the Constitution, the Congress in 1790 enacted in substance what is today Sec. 102 of Title 28 of the United States Code, which provides that: "The trial of all offenses committed upon the high seas, or elsewhere out of the jurisdiction of any particular State or district, shall be in the district

where the offender is found, or into which he is first brought."

The crime of treason charged in the indictment, if committed by the defendant, was committed in Japan—"out of the jurisdiction of any particular state or district" of the United States. The Northern District of California covers generally the Northern portion of the State, including the City and County of San Francisco.

Modeled on instruction 11-Y given in U. S. v. Kawakita Criminal No. 19,665, U.S.D.C., Southern District of California, Central Division.

Defendant's Proposed Instruction No. 40

It is a well settled principle of law that a person cannot, by mere words, be guilty of treason.

Wimmer v. U. S., (CCA-6), 264 Fed. 11-13.

Defendant's Proposed Instruction No. 43

Overt acts cannot rest upon mere inference or conjecture.

In re Charge to Grand Jury, 30 Fed. Case No. 18,272, 1 Bond 609.

Defendant's Proposed Instruction No. 51

An act which renders aid and comfort to the enemy must be an act which actually and substantially strengthened or tended to strengthen the enemy in the conduct of the war; or an act which

actually and substantially weakened or tended to weaken the power of the country to resist or attack the enemy. -

Cramer v. United States, 325 U. S. 1, 29.

Defendant's Proposed Instruction No. 54

Before you can convict the defendant it is necessary that all twelve of you should agree on one and the same alleged overt act. It is not sufficient if some of you agree as to one alleged overt act and others agree as to another.

Defendant's Proposed Instruction No. 55

"The Court instructs the jury that witnesses testifying to oral or written statements made by the defendant before the commencement of this trial, are not witnesses within the meaning of the constitutional provision which requires two witnesses to the same overt act for a conviction of treason.

"The court further instructs the jury that neither oral nor written statements made by the defendant before the commencement of this trial, which have been testified to by one or more witnesses, can be considered by the jury as a substitute for the requirement of the Constitution of the United States that 'No person shall be convicted of Treason unless on the testimony of two witnesses to the same overt act, or on confession in open Court.' "

(U. S. v. Haupt, 136 Fed. (2) 661, 674).

Defendant's Proposed Instruction No. 56

Witnesses testifying to the identity of the voice contained in the recordings as that of the defendant are not witnesses within the meaning of the constitutional provision which requires two witnesses to the same overt act for a conviction of treason.

United States v. Haupt, 136 F. 2nd 661.

Defendant's Proposed Instruction No. 59

Circumstantial evidence, no matter how conclusive, cannot supplant the Constitutional requirement that the overt act must be established by the testimony of two witnesses.

United States v. Robinson, 259 F. 685, 694.

Defendant's Proposed Instruction No. 60

The written statement of the defendant made to an agent of the Federal Bureau of Investigation cannot supply defects in the Constitutional requirement of two witnesses to the overt act.

Haupt v. United States, 91 L. Ed. 803, 809.

Defendant's Proposed Instruction No. 66

Motive and intent are not synonymous; motive is the moving cause which induces action and has to do with desire, while intent is the purpose or design with which an act is done and involves the will.

State v. Logan, 344 Mo. 351, 122 ALR 417.

Weir v. Commr., 109 F. 2nd 996, 999.

Defendant's Proposed Instruction No. 71

A citizen of the United States residing in Japan at the outbreak of war between the two and continuing to reside in Japan thereafter does not thereby adhere to the enemies of the United States.

The Venus, 8 Cranch 253.

Defendant's Proposed Instruction No. 72

Such a citizen of the States owes allegiance not only to the United States but also to Japan, such allegiance to Japan being a local allegiance.

The Venus, 8 Cranch 253.

Defendant's Proposed Instruction No. 75

If you find that the defendant did voluntarily commit one or more of the overt acts charged in the indictment and submitted for your consideration, and that such overt act or acts "actually gave aid and comfort to the enemy," but entertain a reasonable doubt as to whether the defendant had an intent to adhere to or assist our enemies in their prosecution of the war, or to hamper the United States in its prosecution of the war, then the defendant did not act with treasonable intent, and you must acquit her.

Modeled on instruction 11-X given in *U. S. v. Kawakita* Criminal No. 19,665, U.S.D.C., Southern District of California, Central Division.

Defendant's Proposed Instruction No. 110

The natural born subject of a belligerent country who leaves the land of his or her birth before the war and resides within the realm of the other belligerent without becoming naturalized or completely divested of his or her native rights is on the outbreak of war an alien enemy of the government under which he or she resides.

56 Am. Jur. 188.

Defendant's Proposed Instruction No. 111

If you find that the defendant was an American citizen at the time of the outbreak of the war between the United States and Japan on Dec. 8, 1941, and that she resided in Japan at that time, then in Japan she had the status of an alien enemy.

Cf. *Ludecke v. Watkins*, 335 U. S. 160.

Defendant's Proposed Instruction No. 140

No overt act charged in the indictment can constitute treason against the United States if at the time of the alleged overt act the defendant had lost her American citizenship.

Defendant's Proposed Instruction No. 144

If you find from the evidence that the defendant voluntarily renounced or abandoned or otherwise lost her American citizenship or nationality prior to or during the period specified in the indictment, commencing November 1, 1943, and ending August

14, 1945, you must acquit the defendant, because the overt acts charged in the indictment, even if committed by her, could not constitute the crime of treason against the United States, since her duty of allegiance ceased with termination of her American citizenship.

So if you should find from the evidence beyond a reasonable doubt that during the period specified in the indictment the defendant remained an American citizen owing allegiance to the United States, it would be your duty then to consider the second essential element of the charge as set forth in the indictment.

Modeled in instruction 11-L in *U. S. v. Kawakita*, Crim. No. 19,665, U.S.D.C., S.D. Cal., Cen. Div.

Defendant's Proposed Instruction No. 158

If two conclusions can reasonably be drawn from the evidence, one of innocence and one of guilt, the former should be adopted.

United States v. Haupt, 47 F. Supp. 836, 840.

(These instructions have been covered by the Court in other instructions. Defendant Excepts on the ground they have not been so covered.)

[Endorsed]: Filed October 6, 1949.

DEFENDANT'S PROPOSED INSTRUCTIONS

(These instructions have been refused by the Court as not correct statements of the law, not applicable to the evidence in this case, or already covered by other instructions. Defendant Excepts to their refusal.)

Defendant's Proposed Instruction No. 1

The evidence will not support a conviction upon the ground that the defendant committed the act alleged as overt act numbered one in the indictment.

State v. Logan, 344 Mo. 351, 122 ALR 417.

Weir v. Commr., 109 F. 2nd 996, 999.

Defendant's Proposed Instruction No. 2

The evidence will not support a conviction upon the ground that the defendant committed the act alleged as overt act numbered two in the indictment.

State v. Logan, 344 Mo. 351, 122 ALR 417.

Weir v. Commr., 109 F. 2nd 996, 999.

Defendant's Proposed Instruction No. 3

The evidence will not support a conviction upon the ground that the defendant committed the act alleged as overt act numbered three in the indictment.

State v. Logan, 344 Mo. 351, 122 ALR 417.

Weir v. Commr., 109 F. 2nd 996, 999.

Defendant's Proposed Instruction No. 4

The evidence will not support a conviction upon the ground that the defendant committed the act alleged as overt act numbered four in the indictment.

State v. Logan, 344 Mo. 351, 122 ALR 417.

Weir v. Commr., 109 F. 2nd 996, 999.

Defendant's Proposed Instruction No. 5

The evidence will not support a conviction upon the ground that the defendant committed the act alleged as overt act numbered five in the indictment.

State v. Logan, 344 Mo. 351, 122 ALR 417.

Weir v. Commr., 109 F. 2nd 996, 999.

Defendant's Proposed Instruction No. 6

The evidence will not support a conviction upon the ground that the defendant committed the act alleged as overt act numbered six in the indictment.

State v. Logan, 344 Mo. 351, 122 ALR 417.

Weir v. Commr., 109 F. 2nd 996, 999.

Defendant's Proposed Instruction No. 7

The evidence will not support a conviction upon the ground that the defendant committed the act alleged as overt act numbered seven in the indictment.

State v. Logan, 344 Mo. 351, 122 ALR 417.

Weir v. Commr., 109 F. 2nd 996, 999.

Defendant's Proposed Instruction No. 8

The evidence will not support a conviction upon the ground that the defendant committed the act alleged as overt act numbered eight in the indictment.

State v. Logan, 344 Mo. 351, ALR 417.

Weir v. Commr., 109 F. 2nd 996, 999.

Defendant's Proposed Instruction No. 30A

You cannot consider the defendant's admissions upon any of the issues of (1) citizenship (2) aid and comfort or (3) intention unless you first find that the Government has introduced other credible corroborative evidence on the same issue.

Pearlman v. U. S., 10 F (2d), 460, 461, 462 (CCA 9).

Goff v. U. S., 257 F. 294 (CCA 8).

Defendant's Proposed Instruction No. 38

The words "first brought," as used in Judicial Code, Section 41, upon which the venue in this Court is based, mean brought under lawful custody.

Defendant's Proposed Instruction No. 42

You are instructed that the so-called overt acts charged in the indictment are of the type which are allowed to be charged in conspiracy cases but that they do not constitute the type of overt acts contemplated by the constitutional definition of treason and, in consequence, you are instructed to return a verdict of acquittal in favor of the defendant.

Defendant's Proposed Instruction No. 44

Every act, movement, deed and word of the defendant charged to constitute treason must be supported by the testimony of two witnesses.

Cramer v. United States, 325 U. S. 1, 34, 35.

Defendant's Proposed Instruction No. 45

Where the overt acts are single, continuous, and composite, made up of or proved by several circumstances and passing through several stages, it is necessary that there be two witnesses to each circumstance.

United States v. Haupt, 136 F. 2nd 661, 675.

United States v. Robinson, 259 F. 685.

Defendant's Proposed Instruction No. 46

If such an act is alleged as an overt act the entire chain of events of which it is one step must be established by the direct testimony of two witnesses.

State v. Logan, 344 Mo. 351, 122 ALR. 417.

Weir v. Commr., 109 F. 2nd 996, 999.

Defendant's Proposed Instruction No. 48

The defendant must be shown beyond a reasonable doubt to have given both aid and comfort by the overt acts alleged; it is not enough to show that the act gave comfort to the enemy if it did not also actually aid the enemy.

State v. Logan, 344 Mo. 351, 122 ALR. 417.

Weir v. Commr., 109 F. 2nd 996, 999.

Defendant's Proposed Instruction No. 49

The fact that the enemy may have believed that the defendant's commentaries would aid Japan or weaken the United States in the prosecution of the war is not conclusive evidence that they would have that effect.

State v. Logan, 344 Mo. 351, 122 ALR. 417.

Weir v. Commr., 109 F. 2nd 996, 999.

Defendant's Proposed Instruction No. 50

It is a necessary element in every overt act charged against the defendant that such alleged act should have actually given aid and comfort to the enemy. The elements of aid and comfort must be proven by two witnesses and beyond a reasonable doubt just as much as every other element of each overt act which is alleged.

Cramer v. U. S., 325, U. S. 1, 34-5, 89 L. Ed. 1441, 1461.

Haupt v. U. S., 330 U. S. 631, 635, 91 L. Ed. 1145, 1150.

Defendant's Proposed Instruction No. 52

An act which in itself gives the enemy no aid or comfort but is merely a step in a program which if and when completed may give the enemy aid and comfort is not such an overt act as must be alleged and proved to warrant a conviction of treason.

State v. Logan, 344 Mo. 351, 122 ALR. 417.

Weir v. Commr., 109 F. 2nd 996, 999.

Defendant's Proposed Instruction No. 60

There is no direct evidence that any of the alleged overt acts aided Japan or weakened the United States in the prosecution of the war.

State v. Logan, 344 Mo. 351, 122 ALR. 417.

Weir v. Commr., 109 F. 2nd 996, 999.

Defendant's Proposed Instruction No. 70

No one of the overt acts alleged in the indictment is in itself evidence of treasonable purpose and intent.

State v. Logan, 344 Mo. 351, 122 ALR. 417.

Weir v. Commr., 109 F. 2nd 996, 999.

Defendant's Proposed Instruction No. 74

There mere fact that a citizen of the United States resident in Japan rendered services to a Japan corporation and received compensation therefor does not establish that she is guilty of treason to the United States.

The Venus, 8 Cranch 253.

Defendant's Proposed Instruction No. 76

The fact that the defendant made records for broadcast by the Japan Radio Corporation to the United States while the two countries were at war, does not alone establish that she was guilty of treason.

The Venus, 8 Cranch 253.

Defendant's Proposed Instruction No. 83

If the jury find that the defendant's employment by the Japan Radio Corporation and by other agencies of the Japan government was employment for which only a Japan national was eligible, the defendant was expatriated and could not be guilty of treason.

United States v. Haupt, 136 F. 2nd 661, 675.

United States v. Robinson, 259 F. 685.

Defendant's Proposed Instruction No. 84

If the jury find that the defendant did not intend to expatriate herself although urged to do so by others, that fact may be considered by the jury as some evidence that she did not intend to betray the United States.

United States v. Haupt, 136 F. 2nd 661, 675.

United States v. Robinson, 259 F. 685.

Defendant's Proposed Instruction No. 88

Various alleged statements by the defendant as well as records of voice tests have been admitted into evidence for your consideration. Before you deal with these from any other standpoint you must first determine whether the defendant made each of these voluntarily and of her own free will not acting either under inducement or threats. If as to any you do not find that the Government has shown the statement to have been made voluntarily, then

you must discard any such alleged statement from your consideration of the case.

Bram v. U. S., 163 U. S. 532.

Defendant's Proposed Instruction No. 89

A phonographic recording of a short wave radio broadcast is the best evidence of the nature and contents of that recording. A witness's oral testimony of his recollection of what he heard as to the nature and contents of such a broadcast is but secondary evidence which, at best, is but a poor substitute for the phonographic recording itself. In consequence, you are instructed to view with caution or distrust any such testimony as to the nature and contents of a broadcast to which such a witness listened between 4 and 6 years ago.

Defendant's Proposed Instruction No. 105

You are instructed that the original radio script written by a person is the best evidence of its contents and that the present oral testimony of a witness as to its nature and contents four to six years since he read it is at best but a poor substitute for the original script itself and that the testimony of such a witness as to its contents is to be viewed with caution or distrust.

Defendant's Proposed Instruction No. 156

You are instructed that Title 10 U. S. Code, Sec. 15, provides as follows:

"It shall not be lawful to employ any part of the

Army of the United States, as a posse comitatus, or otherwise, for the purpose of executing the laws, except in such cases and under such circumstances as such employment of said force may be expressly authorized by the Constitution or by act of Congress; and any person wilfully violating the provisions of this section shall be deemed guilty of a misdemeanor and on conviction thereof shall be punished by a fine not exceeding \$10,000 or imprisonment not exceeding two years or by both such fine and imprisonment."

You are also instructed that neither the Constitution of the United States nor any act of Congress authorizes any part of the Army of the United States to arrest, detain or imprison the defendant in Japan or to transport her to the United States.

See 17 Opin. Attorney Gen. 71.

19 Opin. Attorney Gen. 293.

Defendant's Proposed Instruction No. 39

It is the duty of all prisoners of war to obey the laws, rules and regulations in force in the country where they are detained.

While held by the enemy, prisoners of war are not of course amenable to the discipline of their own officers, but they are subject to discipline and punishment by the detaining power for violations of any law, rule or regulation of the detaining power.

Given in instruction 11-O (2) in *U.S. v. Kawakita*, Crim. No. 19,665, U.S.D.C., S.D.Cal., Cen.Div.

Defendant's Proposed Instruction No. 106

Article VI, Clause 2 of the U. S. Constitution provides in part: "This Constitution and the laws of the United States which shall be made in pursuance thereof and all treaties made under the authority of the United States shall be the supreme law of the land."

Defendant's Proposed Instruction No. 107

The Geneva Convention of 1929, to which the United States, Japan and other countries were parties, was and is a treaty made under the authority of the United States.

In re Yamashita, 327 U.S. 1, 23.

Defendant's Proposed Instruction No. 108

The provisions of the Geneva Convention between the United States and Japan remained in force at the outbreak of the war between the United States and Japan and throughout the duration of the war.

Cf. Clark v. Allen, 331 U.S. 503, 508.

Defendant's Proposed Instruction No. 109

Article 82 of the Geneva Convention provides as follows:

"The provisions of the present Convention must be respected by the High Contracting Parties under all circumstances.

"In case, in time of war, one of the belligerents is not a party to the Convention, its provisions shall

nevertheless remain in force as between the belligerents who are parties thereto.”

47 U. S. Stats. at L., pgs. 2021-2059.

Defendant's Proposed Instruction No. 112

If you find that the defendant was an American citizen at the outbreak of the war between the United States and Japan on December 8, 1941, and that she was in Japan at that time, then she was in contemplation of law a prisoner of war of Japan.

Rex v. Vine Street Police Station [1916] 1 KB 268.

Ludecke v. Watkins, 335 U.S. 160.

Defendant's Proposed Instruction No. 113

If you find that the defendant was an American citizen at the outbreak of the war between America and Japan on December 8, 1941, and that she was at that time in Japan, you are instructed that she had and continued to have the same rights as a prisoner of war.

Cf. Rex v. Vine St. Police Station [1916] 1 KB 268.

Defendant's Proposed Instruction No. 114

“Except as otherwise hereinafter indicated, every person captured or interned by a belligerent power because of the war is, during the period of such captivity or internment, a prisoner of war, and is

entitled to be recognized and treated as such under the laws of war.”

Art. 70 of War Department Publication
Basic Field Manual, Rules of Land Warfare FM 27-10 (1940).

Defendant's Proposed Instruction No. 115

Where the United States by treaty has consented that its military prisoners of war may do certain kinds of work while under the power of an enemy nation and American civilians are in the enemy country at the outbreak of war with the United States, the United States does not punish its civilian citizens for treason for doing exactly the same thing which it has permitted to its military prisoners.

Defendant's Proposed Instruction No. 116

Article 2 of the Geneva Convention provides in part:

“Prisoners of war are in the power of the hostile Power, but not of the individuals or corps who have captured them.”

47 U. S. Stats. at L., pgs. 2021-2031.

Defendant's Proposed Instruction No. 117

Article 45 of the Geneva Convention provides:

“Prisoners of war shall be subject to the laws, regulations, and orders in force in the armies of the detaining Power.

“An act of insubordination shall justify the adop-

tion towards them of the measures provided by such laws, regulations and orders.

“The provisions of the present chapter, however, are reserved.”

This reservation covers exceptions which I shall state to you in other instructions.

47 U.S. Stats. at L., 2021-2046.

Defendant's Proposed Instruction No. 118

Article 27 of the Geneva Convention provides in part:

“Belligerents may utilize the labor of able prisoners of war, according to their rank and aptitude, officers and persons of equivalent status excepted.”

47 U.S. Stats. at L., pgs. 2021-2040.

Defendant's Proposed Instruction No. 119

Except where otherwise provided by the terms of the Geneva Convention, the defendant while in Japan, was bound to obey the laws of Japan and the orders of Japanese officials both civil and military.

47 U.S. Stats. at L., 2021-2046 (Art. 45).

Defendant's Proposed Instruction No. 120

Article 31 of the Geneva Convention provides in part:

“Labor furnished by prisoners of war shall have no direct relation with war operations. It is especially prohibited to use prisoners for manufacturing

and transporting arms or munitions of any kind, or for transporting material intended for combatant units.”

47 U.S. Stats. at L., pgs. 2021-2041.

Defendant's Proposed Instruction No. 121

Article 29 of the Geneva Convention provides:

“No prisoner of war may be employed at labors for which he is physically unfit.”

47 U.S. Stats. at L., pgs. 2021-2040.

Defendant's Proposed Instruction No. 122

Article 28 of the Geneva Convention provides:

“The detaining Power shall assume entire responsibility for the maintenance, care, treatment and payment of wages of prisoners of war working for the account of private persons.”

47 U.S. Stats. at L., pgs. 2021-2040.

Defendant's Proposed Instruction No. 123

Article 34 of the Geneva Convention provides in part:

“Prisoners of war shall not receive wages for work connected with the administration, management and maintenance of the camps.

“Prisoners utilized for other work shall be entitled to wages to be fixed by agreements between the belligerents.

“These agreements shall also specify the part which the camp administration may retain, the

amount which shall belong to the prisoner of war and the manner in which that amount shall be put at his disposal during the period of his captivity.

“While awaiting the conclusion of the said agreements, payment for labor of prisoners shall be settled according to the rules given below:

“a) Work done for the State shall be paid for in accordance with the rates in force for soldiers of the national army doing the same work, or, if none exists, according to a rate in harmony with the work performed.

“b) When the work is done for the account of other public administrations or for private persons, conditions shall be regulated by agreement with the military authority.”

47 U.S. Stats. at L., pgs. 2021-2042.

Defendant's Proposed Instruction No. 124

It was legal for defendant to receive pay from the Government of Japan or any of its agencies if you find that such was the fact. By the terms of the Geneva Convention with exceptions not material here, the Government of Japan was obliged to pay all American prisoners of war for work which they did while they were such prisoners.

Defendant's Proposed Instruction No. 125

The provisions of the Geneva Convention constitute a consent by the United States that its prisoners of war shall obey the orders of the opposite

belligerent power to the extent that they are not expressly forbidden by the terms of that convention.

Defendant's Proposed Instruction No. 126

As between the United States and its citizens, the provisions of the Geneva Convention legalize all acts done by American citizens in an enemy country which the terms of the Convention do not forbid.

Defendant's Proposed Instruction No. 127

The only work which the Government of Japan could not order American prisoners to do was work which has a direct relation with war operations, such as manufacturing or transporting arms or munitions. If you do not find beyond a reasonable doubt that the defendant performed work which had a direct relation with war operations, then you must find the defendant not guilty.

Defendant's Proposed Instruction No. 128

A person may do voluntarily anything which he or she may be legally ordered to do.

Defendant's Proposed Instruction No. 129

Prisoners of war do not have to decide at their peril whether work which they are ordered to do by the enemy belligerent has a direct or an indirect relation with war operations. If you do not find beyond a reasonable doubt that the defendant herself believed that the work she was doing had a

direct relation with war operations, then you must find her not guilty.

Defendant's Proposed Instruction No. 130

The defendant was not bound to distinguish at her peril as to whether work which she was ordered to do had a direct or an indirect relation with war operations. If any Japanese official, civil or military, in violation of the Geneva Convention ordered defendant to do work which had a direct relation with war operations, defendant was justified in obeying such order and her act in doing so would not be treason. If you entertain a reasonable doubt as to whether any act done by defendant, regardless of its nature, was done in obedience to the orders of any Japanese official then you must find her not guilty.

Defendant's Proposed Instruction No. 131

You are instructed that the work which the defendant did while she was a resident of Japan during the war was not such as had a direct relation with war operations. You must therefore find her not guilty.

Defendant's Proposed Instruction No. 132

Unless you find beyond a reasonable doubt that the defendant performed acts which are not permitted to prisoners of war by the terms of the Geneva Convention, then you must find her not guilty.

Defendant's Proposed Instruction No. 133

If the defendant did no more than play music which was intended to get listeners for other parts of a radio program which contained direct propaganda to the American troops, then the defendant did work which had only an indirect relation with war operations. Such work is permitted by the terms of the Geneva Convention and the defendant cannot be guilty of treason because of it.

Defendant's Proposed Instruction No. 134

If you entertain a reasonable doubt as to whether the defendant did any more than broadcast and introduce music which was to serve as a background for propaganda broadcasts, then the prosecution has not proven beyond a reasonable doubt that the defendant did work which has a direct relation with war operations. In this event you must find the defendant not guilty.

Defendant's Proposed Instruction No. 135

If you find that the defendant discussed her participation in a radio broadcast or the nature of a radio broadcast which she was to make and if you do not find beyond a reasonable doubt that said radio broadcast amounted to more than the announcements for a musical program and a musical program itself, intended to attract listeners' interest for other subjects of a broadcast, then you are instructed that the government has not proven beyond

a reasonable doubt that the defendant did any work which has a direct relation with war operations. If you entertain such reasonable doubt you must find the defendant not guilty.

Defendant's Proposed Instruction No. 136

If you find beyond a reasonable doubt that the defendant did prepare a radio script for subsequent broadcast but if you do not find beyond a reasonable doubt that said radio script was anything other than the introduction for music which was to be played to attract listener interest for other parts of a broadcast, then the government has not proved beyond a reasonable doubt that the defendant engaged in work which has a direct relation with war operations. If you entertain such a reasonable doubt you must find the defendant not guilty.

Defendant's Proposed Instruction No. 137

If any Japanese official, civil or military, in violation of the Geneva convention ordered defendant to do work which had a direct relation with war operations, and defendant believed that she would be killed, physically injured, beaten or the like if she disobeyed, then obedience to such order does not constitute treason.

Defendant's Proposed Instruction No. 138

If you find that defendant did any work which had a direct relation with war operations, but enter-

tain a reasonable doubt as to whether she was ordered to do so and believed she would suffer death, bodily injury, beating or the like if she disobeyed, then you must find the defendant not guilty.

Defendant's Proposed Instruction No. 77

If you find that the broadcasts made by defendant, whether innocent in character or otherwise, were made by her to aid, encourage or assist the U. S. and Allied prisoners of war who were forced to broadcast on the Zero Hour and other Japanese radio programs then she did not have any guilty intent to betray the U. S. and you must acquit her.

Defendant's Proposed Instruction No. 78

If you find that U. S. and Allied POWs were held under duress by the Japanese and that the defendant consented to become a radio announcer simply to aid, assist and encourage U. S. and Allied POWs to defeat the purposes or objectives to which the Japanese devoted them then her broadcasts, whatever their character may have been, were excusable because those POWs were acting under duress exerted upon them by the enemy, and the defendant, in aiding, assisting and encouraging those POWs was aiding and comforting the United States and its Allies and was injuring our enemy Japan.

Defendant's Proposed Instruction No. 79

If you find that the defendant, acting in good faith, became or was a radio broadcaster for the purpose of encouraging, assisting and bolstering up the spirits and morale of our U. S. and Allied POWs and what she did was designed towards that goal you must return a verdict of acquittal in her favor because in such an event she had no intent to commit any unlawful act against the United States.

Defendant's Proposed Instruction No. 85

Under the circumstances of this case, the defendant cannot be found to have had an intent to betray the United States if the motives for her acts was good and to aid the United States.

United States v. Haupt, 47 F. Supp. 836, 844.

Defendant's Proposed Instruction No. 90

If you find that one or more of the U. S. and Allied prisoners of war were responsible for the Japanese authorities selecting or ordering the defendant to become a radio announcer then you must return a verdict of acquittal in favor of the defendant because whatever she said or did in broadcasting, regardless of its character, was caused by those POWs who, as U. S. and Allied officers, were in actuality her superior officers and she was bound to aid and assist them the same as any subordinate officer or men serving in our armed forces who were under their immediate commands.

Defendant's Proposed Instruction No. 91

If you find that any U. S. or Allied POWs were directly or indirectly responsible for having the defendant selected to become a broadcaster and that they led her to believe and she did believe that in so doing she would be assisting them to defeat the purposes of the Japanese you must return a verdict of acquittal.

Defendant's Proposed Instruction No. 92

As to any overt act or acts charged in the indictment and submitted for your consideration which you may find to have been committed by the defendant, if you entertain a reasonable doubt whether the defendant did the act or acts willingly or voluntarily, or so acted only because performance of the duties of her employment required her to do so or because of other coercion or compulsion, you must acquit the defendant.

Modeled on instruction 11-U given in U. S. v. Kawakita Criminal No. 19,665, U.S.D.C., Southern District of California, Central Division.

Defendant's Proposed Instruction No. 93

If you find from the evidence that the defendant was compelled by the Japanese, that is to say, by order of the Japanese Imperial Army Headquarters or by order of Japanese civilian authority at Radio Tokyo, to become a radio broadcaster and that she had no choice but to obey such order or orders and

that, in so doing, she acted in fear that if she failed so to do her life would be imperiled or she would suffer grievous physical harm by the Japanese you must return a verdict acquitting her of the charges brought against her.

Defendant's Proposed Instruction No. 94

If you find from the evidence that the defendant believed and had good cause or reason to believe she was compelled to become an announcer by our enemies, the Japanese, you must acquit her.

Defendant's Proposed Instruction No. 95

If you find from the evidence that U. S. or Allied prisoners of war selected the defendant to become a broadcaster on the Zero Hour program at Radio Tokyo and she was ordered to become a broadcaster by our enemies, the Japanese, then her broadcasts, regardless of their character, were the broadcasts of the U. S. and Allied prisoners of war and, if those prisoners of war themselves were acting under duress, i.e., if they were forced by the Japanese to broadcast, then the defendant's acts are excusable, regardless of their character, because her broadcasts then, too, like those of those prisoners of war, were the products of coercion and compulsion by the enemy.

Defendant's Proposed Instruction No. 96

If you find that defendant did any of the acts charged in the indictment, but find that she was acting under fear of bodily injury, beating or the like if she refused, then you must find for the defendant on such act.

Defendant's Proposed Instruction No. 97

If you find that any act charged in the indictment was done by defendant in fear of death if she refused, then you must find for defendant as to such act.

Defendant's Proposed Instruction No. 98

If you find that the defendant did the acts charged in the indictment, but entertain a reasonable doubt as to whether or not she was acting under fear of bodily injury, beating or the like, then you must find the defendant not guilty.

Defendant's Proposed Instruction No. 99

If you find that the defendant did the acts charged in the indictment but entertain a reasonable doubt as to whether she was acting under fear of death when she did them, then you must find her not guilty.

Defendant's Proposed Instruction No. 100

If you find that any and all acts charged by the indictment were done by defendant under fear of

bodily injury, beating or the like if she refused, then you must find the defendant not guilty.

Defendant's Proposed Instruction No. 101

If you find that any and all acts charged by the indictment were done by defendant under fear of death if she refused, then you must find her not guilty.

Defendant's Proposed Instruction No. 102

If you find that defendant did any of the acts charged in the indictment, but entertain a reasonable doubt as to whether she was actually in fear of death if she refused, then you must find for the defendant on such act.

Defendant's Proposed Instruction No. 103

If you find that defendant did any of the acts charged in the indictment but entertain a reasonable doubt as to whether she was acting in fear of bodily injury, beating or the like if she refused, then you must find for the defendant on such act.

Defendant's Proposed Instruction No. 104

In reaching a verdict you must take into consideration that a young woman, such as this defendant was in 1943, would not be expected to have as much courage in the face of threats and danger from the enemy as would male soldiers and civilians or as much as ordinary prudent soldiers or civilians. You must expect that she would be more prone to fear

in the face of danger to herself than would a U. S. soldier or male civilian. If our POWs were held in duress and acting under fear and were intimidated into becoming broadcasters by the Japanese it is reasonable to presume that lesser factors of personal danger would induce or cause a young woman to be in great fear and to obey orders issued to her by the Japanese enemy.

Defendant's Proposed Instruction No. 139

If any threats were made to the defendant of death, bodily injury, beating or the like if she refused to obey orders given to her, it is immaterial whether such threats were communicated to her directly by Japanese officials or whether they were communicated to her by prisoners of war as coming from Japanese officials.

Defendant's Proposed Instruction No. 155

If you find that the defendant's guilt or innocence of the crime charged in this indictment has been previously passed upon by a competent tribunal either in her favor or against her, then you are instructed that she has been once in jeopardy and you must find her not guilty.

Defendant's Proposed Instruction No. 157

If you find that the defendant was arrested in Japan on or about October 17, 1945, and continuously thereafter was imprisoned in the Yokohama

Prison in Japan to on or about November 16, 1945, and thereafter was imprisoned in the Sugamo Prison in Japan to on or about October 26, 1946, by the United States or by authority of the United States you are instructed to return a verdict of acquittal against her because that punishment inflicted upon her by such authority constitutes either a prior conviction or a prior acquittal of the defendant by the United States and the Fifth Amendment of the Constitution forbids this indictment and trial because it subjects the defendant twice for the same alleged offense and puts her twice in jeopardy, in violation of the Fifth Amendment.

Defendant's Proposed Instruction No. 45-A

It is alleged in the indictment that the Broadcasting Corporation of Japan was controlled by the Imperial Japanese Government of Japan. Proof of this fact, if it be a fact, is an essential part of every one of the overt acts alleged in the indictment. Unless you find that the Government has proven beyond a reasonable doubt and with two witnesses that the Broadcasting Corporation of Japan was an agency of the Imperial Japanese Government under Japanese law at the time of the alleged overt acts you must find the defendant not guilty.

Defendant's Proposed Instruction No. 45-B

It is alleged in the indictment that the Broadcasting Corporation of Japan was controlled by the Imperial Japanese Government of Japan. Proof of

this fact, if it be a fact, is an essential part of every one of the overt acts alleged in the indictment. Unless you find that the Government has proven beyond a reasonable doubt that the Broadcasting Corporation of Japan was an agency of the Imperial Japanese Government under Japanese law at the time of the alleged overt acts you must find the defendant not guilty.

Defendant's Proposed Instruction No. 45-C

It is alleged in the indictment that the Broadcasting Corporation of Japan was controlled by the Imperial Japanese Government of Japan. Proof of this fact, if it be a fact, is an essential part of every one of the overt acts alleged in the indictment. You must find for the defendant upon each overt act as to which you are not convinced that the Government has proven beyond a reasonable doubt and with two witnesses that the Broadcasting Corporation of Japan was an agency of the Imperial Japanese Government under Japanese law at the time of the alleged overt act.

Defendant's Proposed Instruction No. 45-D

It is alleged in the indictment that the Broadcasting Corporation of Japan was controlled by the Imperial Japanese Government of Japan. Proof of this fact, if it be a fact, is an essential part of every one of the overt acts alleged in the indictment. You must find for the defendant upon each overt act as to which you are not convinced that the

Government has proven beyond a reasonable doubt that the Broadcasting Corporation of Japan was then an agency of the Imperial Japanese Government under Japanese law at the time of the alleged overt act.

Defendant's Proposed Instruction No. 161

Amendment VI to the United States Constitution provides in part as follows:

"In all criminal prosecutions, the accused shall enjoy the right to a speedy . . . trial."

Defendant's Proposed Instruction No. 162

If you find that the defendant was not accorded a speedy trial by the United States, you must acquit her.

Amendment VI, U. S. Constitution.

Defendant's Proposed Instruction No. 163

If you find that the defendant was denied a speedy trial by the actions of the United States or its officers, you must acquit the defendant.

Amendment VI, U. S. Constitution.

Defendant's Proposed Instruction No. 164

If you have a reasonable doubt as to whether the defendant was accorded a speedy trial by the United States, you must acquit the defendant.

Amendment VI, U. S. Constitution.

Defendant's Proposed Instruction No. 165

If you find that the United States incarcerated the defendant for thirteen months or thereabouts without bringing charges against her, it deprived her of the constitutional right to a speedy trial, and you must acquit the defendant.

Defendant's Proposed Instruction No. 166

If you entertain a reasonable doubt as to whether the actions of the United States accorded or denied a speedy trial to defendant, and if you entertain a reasonable doubt as to whether all material evidence is now available which was available at the time of the defendant's first arrest in September of 1945, then you must acquit the defendant.

U. S. v. McWilliams, 163 Fed. (2d), 695, 696.

Defendant's Proposed Instruction No. 167

You are instructed that by incarcerating the defendant for 13 months in 1945 and 1946 without bringing charges against her, the United States deprived the defendant of her constitutional right to a speedy trial and you must acquit the defendant.

Defendant's Proposed Instruction No. 168

If you find that the defendant has been denied a speedy trial by the actions of the United States and that evidence material to the case has become lost or unavailable in the meantime then you must acquit the defendant.

U. S. v. McWilliams, 163 F 2d, 695, 696.

Defendant's Proposed Instruction No. 169

If the evidence is such that it raises a reasonable doubt in your minds as to whether the defendant was accorded a speedy trial or whether a speedy trial was denied her by the actions of the United States or its officers, then you must acquit the defendant.

Amendment VI, U. S. Constitution.

Receipt of a copy of the foregoing Defendant's Proposed Supplemental Instructions to Jury is hereby admitted this 25th day of August, 1949.

FRANK J. HENNESSY,

U. S. Attorney.

TOM DE WOLFE,

Special Assistant to the

Attorney General.

/s/ JAMES W. KNAPP,

/s/ TOM DE WOLFE,

Per J.W.K.,

Attorneys for Plaintiff.

Defendant's Proposed Instruction No. 142

If you find that the defendant at the time of her marriage to Philip d'Aquino, or at any other time, made a formal declaration of allegiance to the Republic of Portugal, then she lost her American citizenship as a result of such declaration.

Defendant's Proposed Instruction No. 143

Questions as to whether or not a person is an American citizen and his or her duty of allegiance as such are determined in accordance with the law of the United States. But whenever our laws incorporate by reference or adopt the laws of another country, the foreign law thus adopted is to be considered the same as if a part of the law of the United States. What the foreign law is—in this case the law of Portugal—is a question of fact to be determined by the jury from the evidence, the same as any other question of fact.

Defendant's Proposed Instruction No. 145

If you find that Philip d'Aquino was a citizen of Portugal at the time of defendant's marriage to him, then it is your duty to determine the law of Portugal as to the effect of such marriage on defendant's citizenship from the testimony which has been presented in court.

Defendant's Proposed Instruction No. 146

If you find that under the law of Portugal, defendant's marriage to Philip d'Aquino constituted naturalization into Portuguese citizenship, then the defendant lost her American citizenship as a result of said marriage.

Defendant's Proposed Instruction No. 147

If you find that under the law of Portugal, defendant's marriage to Philip d'Aquino constituted

a formal declaration of allegiance to the Republic of Portugal then the defendant lost her American citizenship as a result of said marriage.

Defendant's Proposed Instruction No. 148

If you find that defendant lost her American citizenship as a result of her marriage, you are instructed that she cannot be guilty of treason because of any overt act occurring after the date of said marriage, namely, April 19, 1945.

Defendant's Proposed Instruction No. 149

If defendant at any time made a formal declaration of allegiance to the Republic of Portugal, then she cannot be found guilty of treason to the United States for any act committed after the date of such formal declaration.

Defendant's Proposed Instruction No. 150

If you find that the defendant at any time acquired Portuguese citizenship and lost her American citizenship it is your duty to find her not guilty on all acts charged to have occurred at a date later than defendant's loss of her American citizenship.

Defendant's Proposed Instruction No. 151

If you find that the defendant is a citizen of Portugal you must find her not guilty.

Defendant's Proposed Instruction No. 152

If you find that the defendant was a Portuguese citizen during the times specified in the indictment, you must find her not guilty.

Defendant's Proposed Instruction No. 153

If you find that the defendant was a Portuguese national or citizen at the time she was arrested in Japan on or about August 26, 1948, by agents of the U. S. and that she thereafter was transported to the United States from Japan in September, 1949, by agents of the U. S., you must return a verdict of acquittal in her favor.

Defendant's Proposed Instruction No. 154

You are instructed that the uncontradicted evidence demonstrates that, by the law of Portugal, as well as by the law of the United States, the defendant lost her U. S. citizenship by virtue of the fact and at the very time she married her husband on April 19, 1945, in Tokyo, Japan, and that by that marriage which was registered at the Portuguese Consulate in Tokyo, Japan, in April or May, 1945, and also by the registration thereof thereafter at Lisbon, Portugal, she became exclusively a Portuguese national and citizen and since that time she has not been subject to process of the United States and she has not been subject to seizure in Japan by agents of the U. S. and she has not been subject to being brought here to be indicted in this cause.

Further, by the law of Portugal she became a Portuguese subject, an exclusive Portuguese national and citizen owing allegiance only to Portugal and not to the U. S. Further, by reason thereof she lost her U. S. nationality and from that time forth owed no allegiance to the U. S. and, since she was not a citizen of the U. S. on August 26, 1948, she was not properly subject to seizure and transportation to the U. S. to be indicted.

These instructions have been refused by the Court as not correct statements of the law, not applicable to the evidence in this case, or already covered by other instructions. Defendant excepts to their refusal.

[Endorsed]: Filed October 6, 1949.

District Court of the United States, Northern
District of California, Southern Division

At a Stated Term of the District Court of the United States for the Northern District of California, Southern Division, held at the Court Room thereof, in the City and County of San Francisco, on Thursday, the 6th day of October, in the year of our Lord one thousand nine hundred and forty-nine.

Present: The Honorable Michael J. Roche,
District Judge.

[Title of Cause.]

ORDER

(Minute order denying Motion for new trial, Motion for acquittal or new trial, and Motion in arrest of judgment. Sentence.)

This case came on regularly this day for judgment, motion for new trial, motion for acquittal or new trial, and a motion in arrest of judgment. The defendant was present in the custody of the United States Marshal and with her attorneys, Wayne Collins, Esq., Theodore Tamba, Esq., and George Ols-

hausen, Esq. Tom De Wolfe, Esq., and James Knapp, Esq., Special Assistants to the Attorney General, and Hon. Frank J. Hennessy, U. S. Attorney, were present on behalf of the United States. After hearing the arguments of Mr. Olshausen and Mr. De Wolfe, the above-mention motions were submitted to the Court for decision, and due consideration having been had thereon, it is Ordered that the Motion for a new trial, the Motion for acquittal or new trial, and the Motion in arrest of judgment be, and each of them, is hereby denied.

The defendant was called for judgment. After hearing Mr. Collins and Mr. De Wolfe, It Is Ordered that the defendant Iva Ikuko Toguri d'Aquino, for the offense of Treason Against the United States of which said defendant stands convicted by unanimous verdict of the jury, be committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of Ten (10) Years and pay a fine to the United States in the sum of Ten Thousand Dollars (\$10,000.00).

It Is Ordered that judgment be entered herein accordingly.

District Court of the United States for the Northern
District of California, Southern Division

No. 31712 R

UNITED STATES OF AMERICA

vs.

IVA IKUKO TOGURI D'AQUINO.

JUDGMENT AND COMMITMENT

On this 6th day of October, 1949, came the attorney for the government and the defendant appeared in person and with counsel;

It Is Adjudged that the defendant has been convicted upon her plea of not guilty and a verdict of guilty of the offense of Treason (Title 18 U.S.C., Section 1) as charged in the Indictment and the court having asked the defendant whether she has anything to say why judgment should not be pronounced, and no sufficient cause to the contrary being shown or appearing to the Court,

It Is Adjudged that the defendant is guilty as charged and convicted.

It Is Adjudged that the defendant is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of Ten (10) Years and pay a fine to the United States of America in the sum of Ten Thousand Dollars (\$10,000.00).

It Is Ordered that the Clerk deliver a certified copy of this judgment and commitment to the

United States Marshal or other qualified officer and that the copy serve as the commitment of the defendant.

/s/ MICHAEL J. ROCHE,
United States District Judge.

/s/ J. P. WELSH,
Deputy Clerk.

Examined by:

/s/ TOM DE WOLFE,
Special Asst. to the U. S.
Attorney General.

Filed and entered this 6th day of October, 1949.

C. W. CALBREATH,
Clerk.

[Title of District Court and Cause.]

NOTICE OF MOTION FOR ADMISSION OF
THE DEFENDANT TO BAIL PENDING
APPEAL

To the Plaintiff Above Named and to Frank J. Hennessy, U. S. Attorney, and to Tom De Wolfe, Special Assistant to the Attorney General, Its Attorneys:

You and each of you will please take notice that on Monday, October 10, 1949, at the hour of 10:00 a.m. or as soon thereafter as counsel can be heard in Room 338 of the Post Office Building at Seventh and Mission Streets, San Francisco, California, defendant will move the court for its order

admitting her to bail pending appeal. Said motion will be made upon the ground that since the imposition of a prison sentence for a term of years, this case does not now involve a possibility of capital punishment and that the appeal of defendant is taken in good faith and upon substantial grounds. This notice is based upon all of the records and files in this case, including particularly the transcript of the evidence and defendant's Motion for a New Trial Under Rule 33, Motion for Acquittal or New Trial Under Rule 29 (b), Motion for Arrest of Judgment Under Rule 34 and the Notice of Appeal filed concurrently with this Notice of Motion.

/s/ WAYNE M. COLLINS,

/s/ GEORGE OLSHAUSEN,

/s/ THEODORE TAMBA,

Attorneys for Defendant.

Points and Authorities:

Rules of Criminal Procedure 38 (b), 46 (a) (2); Rossi v. U. S., 11 Fed. (2d) 264; Hudson v. Parker, 156 U. S. 277, 286; Hanes v. U. S., 299 Fed. 296; McKnight v. U. S., 113 Fed. 45; U. S. v. Nardone, 106 Fed. (2d) 41; U. S. v. Motlow, 10 Fed. (2d) 657. Some of the above cases arose under the old rule substantially the same as the present rule. See old rule VI, paragraph 2, 292 U. S. 61, 78 L.Ed. 1512, 1514.

Receipt of Copy attached.

[Endorsed]: Filed October 7, 1949.

[Title of District Court and Cause.]

ORDER STAYING EXECUTION

Good cause appearing therefor, it is hereby ordered that the sentence and judgment imposed in the above-entitled case on October 6, 1949, be and the same is hereby stayed to and including October 17, 1949.

Dated: October 7, 1949.

/s/ MICHAEL J. ROCHE,
District Judge.

[Endorsed]: Filed October 7, 1949.

[Title of District Court and Cause.]

AFFIDAVIT

United States of America,
Northern District of California,
City and County of San Francisco—ss.

Iva Ikuko Toguri d'Aquino, being first duly sworn, deposes and says: that she is the defendant in the above-entitled action; that she is an adult female, over the age of twenty-one years of age, a citizen of the United States of America by birth and so declared in the above-entitled proceeding to be a U. S. citizen, the party defendant in the above-entitled proceeding; that she is an indigent; that aside from used clothing and a few personal effects, the reasonable value of which does not exceed Twenty-Five (\$25.00) Dollars, she possesses the following assets only, viz: sundry household furniture, dishes, trunk, one sewing machine and utensils of the reasonable value of \$100.00 (One Hundred Dollars), said property being owned jointly with her husband, Philip d'Aquino, and the same being situated in Tokyo, Japan; that she does not possess any real property whatsoever save and except a remote claim or right, subservient to the right of the Attorney General as the Alien Property Custodian, in and to certain real property situated in Los Angeles County, California, described as follows:

Lots 42 and 57 of the South Gate Tract in the Rancho Tajauta, as per map recorded in

Book 13, Pages 14 and 15 of Maps in the office of the County Recorder of said County, and portion of the 538.28-acre tract of land allotted to Jose Maria Abila in the partition of Rancho Tajauta, Case Number 1200 of the 17th Judicial District Court in the County of Los Angeles.

Which said property she is informed and believes has an approximate market value of Three Thousand Five Hundred Dollars (\$3,500.00), the interest of the defendant therein, however, being at most a disputable claim and hence of substantially no value whatever to her.

That because of her said indigency and poverty, she is unable to pay the costs of the said action and the appeal from the judgment of conviction following the verdict and sentence of the court to ten years' imprisonment and to pay the \$10,000 fine or any portion thereof which was imposed upon her herein; that she believes she is entitled to the redress she seeks in her appeal from the said judgment of conviction of this court to the United States Court of Appeals for the Ninth Circuit; that the nature of said appeal is that said judgment should be reversed on all of the grounds heretofore enumerated in the following motions filed after the verdict: Motion for New Trial Under Rule 33, Motion for Arrest of Judgment Under Rule 34, and Motion for Acquittal or New Trial Under Rule 29 (b).

Wherefore affiant prays for the order of this Court waiving the costs and expenses aforesaid and directing that the costs of said appeal and the expense of certifying and preparing and printing the record on appeal herein be paid by the United States and that the same be paid when authorized by the Attorney General as provided by 28 U. S. C. 1915.

Dated: October 7, 1949.

/s/ IVA IKUKO TOGURI

d'AQUINO,

Affiant.

(Defendant and Appellant.)

Subscribed and sworn to before me this 7th day of October, 1949.

[Seal] /s/ ERNEST BESIG,

Notary Public in and for the City and County of San Francisco, State of California.

[Endorsed]: Filed October 7, 1949.

[Title of District Court and Cause.]

ORDER DISPENSING WITH PAYMENT OF
FEES AND COSTS OF PRINTING REC-
ORD ON APPEAL

Upon reading and filing the affidavit in forma pauperis of Iva Ikuko Toguri d'Aquino, defendant and appellant in the above-entitled cause,

It Is Hereby Ordered that said defendant and appellant may, without being required to prepay fees and costs or for the printing of the record on appeal herein, prosecute or defend to a conclusion her appeal to the appellate court or courts herein, and

It Is Hereby Ordered and Directed that the expense of printing the record on appeal herein be paid by the United States, and that the same shall be paid when authorized by the Director of the Administrative Office of the United States Courts.

Dated: October 7, 1949.

/s/ MICHAEL J. ROCHE,
U. S. District Judge.

[Endorsed]: Filed October 7, 1949.

[Title of District Court and Cause.]

NOTICE OF APPEAL

The defendant above-named hereby appeals to the United States Court of Appeals for the Ninth

Circuit from the judgment and sentence rendered in the above-entitled case on October 6, 1949, which judgment sentenced defendant to ten years in prison and imposed a fine of \$10,000. The defendant's present address is County Jail No. 3, Washington and Dunbar Streets, San Francisco, California. Defendant's attorneys are Wayne M. Collins, George Olshausen and Theodore Tamba, all of whom have as their address for the purposes of this case Room 1701 Mills Tower, 220 Bush Street, San Francisco, California. In addition, the latter two attorneys have general separate addresses as follows: George Olshausen, 280 Union Street, San Francisco 11, California; Theodore Tamba, 68 Post Street, San Francisco 4, California.

Defendant is now confined in San Francisco County Jail No. 3, the same address stated above.

The offense with which defendant is charged is violation of 18 U.S.C. 1, treason. Specifically, it is charged that during the war between the United States and Japan from 1941 to 1945, defendant gave radio broadcasts over Radio Tokyo on behalf of the Imperial Japanese Government.

/s/ WAYNE M. COLLINS,

/s/ GEORGE OLSHAUSEN,

/s/ THEODORE TAMBA,

Attorneys for Defendant.

[Endorsed]: Filed October 7, 1949.

District Court of the United States, Northern District of California, Southern Division

At A Stated Term of the District Court of the United States for the Northern District of California, Southern Division, held at the Court Room thereof, in the City and County of San Francisco, on Monday, the 10th day of October, in the year of our Lord one thousand nine hundred and forty-nine.

Present: The Honorable Michael J. Roche,
District Judge.

[Title of Cause.]

MINUTE ORDER DENYING MOTION FOR BAIL PENDING APPEAL

This case came on regularly this day for hearing on motion for bail pending appeal. Defendant was present with her attorney, Geo. Olshausen, Esq. Hon. Frank J. Hennessy, United States Attorney, and Tom DeWolfe, Esq., Special Assistant to the Attorney General, were present for the United States. After hearing the arguments of Mr. Olshausen and Mr. DeWolfe, it is Ordered that said motion for bail pending appeal be denied.

RE EACH OF THE FOLLOWING
DEPOSITIONS

(Answers to questions to which objections were sustained are shown in parenthesis. Where part of an answer was read before objection, or before the court's ruling, this part is shown without parenthesis and later the full answer in parenthesis.)

In the Southern Division of the United States
District Court for the Northern District of
California

No. 31712 R

UNITED STATES OF AMERICA,

Plaintiff,

vs.

IVA IKUKO TOGURI D'AQUINO,

Defendant.

DEPOSITION OF GEORGE NODA

Deposition of George Noda, taken before me,
Thomas W. Ainsworth, Vice Consul of the United
States of America, in Mitsui Main Bank Building,
Room 335, in Tokyo, Japan, under the authority
of a certain stipulation for taking oral designations
abroad, and upon order of the United States Dis-
trict Court, made and entered March 22, 1949, in
the Matter of United States of America vs. Iva
Ikuko D'Aquino, pending in the Southern Division

of the United States District Court, for the Northern District of California, and at issue between the United States of America vs. Iva Ikuko Toguri D'Aquino.

The plaintiff appearing by Frank J. Hennessy, United States District Attorney; Thomas DeWolfe, Special Assistant to the Attorney General, and Noel Story, Special Assistant to the Attorney General, and the defendant, appearing by Wayne N. Collins and Theodore Tamba.

The said interrogations and answers of the witness thereto were taken stenographically by Irene Cullington and were then transcribed by her under my direction and the said transcription being thereafter read over correctly to said witness by me and then signed by said witness in my presence.

It is Stipulated that all objections of each of the parties hereto, including the objections to the form of the questions propounded to the witness and to the relevancy, materiality and competency thereof, and the defendant's objections to the use of the deposition, or any part of the deposition, by plaintiff, on the plaintiff's case in chief, shall be reserved to the time of trial in this cause.

GEORGE NODA

of Tokyo, Japan, an economic adviser to GHQ, SCAP, of lawful age, being by me first duly sworn, deposes and says:

Direct Examination

By Mr. Tamba:

Q. Mr. Noda, what is your full name?

A. My name is George Noda.

Q. Where do you reside, Mr. Noda?

A. My present address is c/o Mrs. Sekine, 88-3 Ikegami Tokumochi Ota-Ku, Tokyo-To.

Q. Are you married or single, Mr. Noda?

A. I am single.

Q. What is your business or occupation?

A. Presently I am employed by Price and Distribution Division, ESS, GHQ, SCAP, in the capacity of economic advisor.

Q. And you are a citizen and national of what country?

A. I am a citizen and national of Japan.

Q. Were you ever employed by Radio Tokyo?

A. I was.

Q. When were you employed there?

A. From December, 1942, through September, 1943. My job was officially terminated because of my entry into Kyushu Imperial University. However, I returned from my trip to Kyushu, I believe

(Deposition of George Noda.)

in October, and I spent the month of [2*] November in and around Tokyo and I spent most of the time at Radio Tokyo.

Q. You were in and about the studio in the month of October, 1943?

A. I believe more in November.

Q. Were you there during the month of December, 1943? A. No, I wasn't.

Q. Do you know the defendant, Iva D'Aquino.

A. I do.

Q. When did you first meet her?

A. I met her some time before she started working for Radio Tokyo.

Q. Did you see her in and about the premises known as Radio Tokyo? A. Yes.

Q. When did you see her?

A. Before she started working she used to come up every so often to visit friends and then I saw her in November, 1943.

Q. Did you ever see her occupied as a typist?

A. No, but I heard she had been during my trip down to Kyushu.

Q. Were you familiar with the program known as the "Zero Hour."

A. When I was working there it was a very short program, about 15 minutes.

Q. Who were the personnel on the program at that time?

* Page numbering appearing at bottom of page of original Reporter's Transcript.

(Deposition of George Noda.)

A. Mr. Norman Reyes and/or Mr. Ted Wallace Ince.

Q. Anyone else? A. At that time, no.

Q. Now do you recall about the time she started on the program, you say it was November, 1943, is that correct?

A. It must have been, because she wasn't working on that program when I left in September.

Q. Now, what part did she take on the program, if you know?

A. She was introducing records. [3]

Q. How was she introducing these records, was it from prepared script?

A. I saw her reading from script.

Q. Do you know who prepared that script for her?

A. I didn't ask her; I don't remember asking, but from my knowledge of the operations of Radio Tokyo at that time, I think I would be quite correct in saying that it was either Mr. Norman Reyes, Mr. Wallace Ince or Mr. Cousens.

Q. Do you know of your own knowledge that either Cousens, Ince or Reyes prepared script for that program?

A. Yes, I do.

Q. You say you saw Mrs. D'Aquino broadcast, is that correct?

A. Yes.

Q. Will you tell us what kind of broadcasting she did; describe her to us.

A. My opinion as to her ability as an announcer is that she was very poor. I was very surprised

(Deposition of George Noda.)

that anybody had qualified her for that position; her voice was deep and cracked; her speech jerky.

Q. Was she fluent? A. No.

Q. That is the kind of broadcasting you heard while you were there? A. That is right.

Q. Were there any other woman broadcasters while you were there?

A. Yes, Miss June Suyama; Miss Ruth Hayakawa, and every so often Katherine Morooka.

Q. Any others that you can recall at this time?

A. No.

Q. Of the three girls that you mention, which of the three took part in the "Zero Hour" program?

A. I think, Miss Morooka. [4]

Q. What part did Ruth Hayakawa take in the Zero Hour program?

A. I don't remember her having any part in the "Zero Hour" program.

Q. How about June Suyama?

A. I don't think she had any part.

Q. What did she do?

A. Miss Suyama was, at that time, one of the best announcers in Radio Tokyo. She handled news broadcasts; sometimes read commentaries. She worked mostly from 8 to 5.

Q. Where is she, if you know, at the present time?

A. Miss Suyama, I heard, was killed by a truck.

Q. Now do you know of any PWs being slapped

(Deposition of George Noda.)

by any army officer around Radio Tokyo while you were there?

Mr. DeWolfe: Object to that as incompetent, irrelevant and immaterial, too remote.

The Court: Read it again please.

(Question reread by Mr. Collins.)

The Court: I will allow it. The objection is overruled.

A. It was common knowledge in Radio Tokyo that when Major Cousens was first brought in to Radio Tokyo, by, I believe, Japanese officer named Major Muto, and he refused to follow instructions given by Major Muto, that he was slapped and humiliated.

The Court: Let that question and answer go out and let the jury disregard it for any purposes of this case.

Q. What time of the day did the Zero Hour come on, Mr. Noda? A. It was from 6 to 7.

Q. You left the radio station and went into the army, is that correct?

A. In September when I resigned, I resigned because I had been permitted entry into Kyushu Imperial University. I had to go down to Kyushu to continue my studies. About a month after I got down there, I was informed that I was being drafted into the Japanese Army and I had to return in October to take my physical examination.

Q. You told us that before. While you were in

(Deposition of George Noda.)

the Japanese Army, where were you stationed?

A. I was in Japan.

Q. Let me ask you. Can you tell us when the air raids commenced [5] in this area, if you recall, the month and year?

A. The air raids started around February, 1945, and grew worse and worse through March and April. Some of the specific dates I remember are March 9, April 14 and 15.

Q. You have appeared voluntarily as a witness for this defendant? A. I have.

Q. Have you been interviewed by anyone else other than me about this case?

A. No. I was interviewed by CIC.

Q. When was that?

A. That was in late 1945.

Q. I think that is all.

Cross-Examination

By Mr. Story:

Q. Where were you born?

A. I was born in Victoria, B. C., Canada.

Q. Did you ever live in the United States?

A. No.

Q. Were you ever in the United States?

A. Yes.

Q. For how long?

A. About four hours. I took one of those short trips to Seattle and returned the same day.

Q. How many times did you see Miss Toguri at the microphone broadcasting at Radio Tokyo?

(Deposition of George Noda.)

A. About three times.

Q. You mentioned a moment ago that you had been interviewed by the CIC? A. Yes.

Q. When was that? A. Late in 1945.

Q. Did you sign a statement?

A. I don't remember. [6]

Q. Do you recall at the time you were interviewed by the CIC that you told them you saw Miss Toguri at the microphone only one time and that you did not know whether it was a voice test or broadcast.

A. I am sorry; I don't have any recollection of the statements I made; whether I signed any statement or not. All I remember is that I spoke to a CIC agent about Miss Toguri.

Q. Then you don't really know how many times you did see Miss Toguri at the radio station?

A. I do know it was more than once.

Q. Was she broadcasting or making a voice test?

A. I know definitely on one occasion she was broadcasting.

Q. Then the statement you made to the CIC is not a true statement?

A. I don't know what statement I made——

Mr. Collins: Just a moment, Mr. Tamba. I object to that as examining something not in evidence, and on the further ground that no foundation has been laid and the further ground that it is argumentative and the further ground——

(Deposition of George Noda.)

The Court: The objection is sustained; proceed.

(A. I don't know what statement I made to the CIC.)

Q. What were you doing when you came back from the University to Tokyo?

A. I was visiting. Well, actually, I was spending my last month as a civilian and trying to enjoy myself.

Q. Had you resigned from the University at that time?

A. No, there wasn't a definite resignation, or whatever you wish to call it, but they had a system whereby everybody who was drafted, and most college students were at that time, was put on temporary leave, let us say, for the duration.

Q. In other words, you are telling us that you left here in September to enroll in the University?

A. That is right.

Q. That you enrolled in the University in September and came back to Tokyo and stayed here during the months of October and November?

A. I believe I said I came back in October and that it was November that I actually spent in Tokyo.

Q. When were you drafted?

A. I was drafted on December 1.

Q. Of your own knowledge, do you know who prepared the scripts that you saw Miss Toguri read at the radio station?

A. I did not see who did it.

(Deposition of George Noda.)

Q. So you don't know of your own knowledge who wrote the scripts?

A. I don't know, yes. I have seen, with my own eyes, Norman Reyes, Ted Wallace, and Cousens prepare scripts. I don't know definitely whether they prepared the scripts used by Miss Toguri.

(Q. Were you present when prisoners of war working at the radio station were mistreated?

A. No, I wasn't.)

Q. Then of your own knowledge you do not know——

Mr. Collins: I ask that that might be stricken out as calling for the opinion and conclusion of the witness and the further ground that no foundation has been laid, and on the further ground that it was improper cross-examination, and Your Honor has made a ruling on the prior question covering that.

The Court: Read the question Mr. Reporter.

Mr. DeWolfe: Excuse me, Your Honor, maybe we can obviate it. I think his objection is proper. The direct examination was excluded on that same point.

The Court: The objection will be sustained.

Mr. DeWolfe: I will confess the propriety of the objection. And the next question and answer, with the consent of counsel, may likewise be deleted, because it deals with the same point.

The Court: So stipulated?

Mr. Collins: No, you may——?

(Deposition of George Noda.)

Mr. DeWolfe: Starting at line 12, "Then, of your own knowledge——?"

Mr. Collins: No, I can't, because I don't think that was stricken out. This is as to the voice test.

(Conversation between Messrs. DeWolfe and Collins out of hearing of reporter.)

Mr. DeWolfe: Right here (Indicating).

Mr. Collins: Oh yes, that goes out, that is from line 9 to and including line 14; it may go out.

The Court: Very well, it may go out. Let the record so show.

Mr. Collins: Page 8.

(Q. Then, of your own knowledge, you don't know if anybody was mistreated? A. No.)

Mr. Tamba: Mr. Noda, do you recall that I asked you yesterday whether Mrs. D'Aquino was taking a voice test with Major Cousens, Lt. Norman Reyes and you being present in the room at that time.

A. I can't remember anything distinctly as to a voice test for Miss Toguri.

Q. But you remember her speaking over the Microphone? A. Yes.

Q. How old are you, Mr. Noda?

A. I am 26 years old.

Q. When did you come to Japan from Canada?

A. In the summer of 1936.

Q. What was your age at that time?

A. Thirteen.

(Deposition of George Noda.)

Q. And you have remained here ever since?

A. Yes. [8]

/s/ GEORGE NODA.

Japan,

City of Tokyo,

American Consular Service—ss:

I do solemnly swear that I will truly and impartially take down in notes and faithfully transcribe the testimony of George Noda, a witness now to be examined. So help me God.

/s/ IRENE CULLINGTON.

Subscribed and sworn to before me this fifteenth day of April A.D. 1949.

/s/ THOMAS W. AINSWORTH,

Vice Consul of the United
States of America.

[American Consular Service Seal.]

Service No. 566a; Tariff No. 38; No fee prescribed.

Japan,

City of Tokyo,

American Consular Service—ss:

CERTIFICATE

I, Thomas W. Ainsworth, Vice Consul of the United States of America in and for Tokyo, Japan, duly commissioned and qualified, acting under the authority of a certain stipulation for taking oral

designations abroad, and upon order of the United States District Court, made and entered March 22, 1949, in the Matter of United States of America, Plaintiff, vs. Iva Ikuko Toguri D'Aquino, Defendant, pending in the Southern Division of the United States District Court, for the Northern District of California, and at issue between United States of America vs. Iva Ikuko Toguri D'Aquino, do hereby certify that in pursuance of the aforesaid stipulation and court order and at the request of Theodore Tamba, counsel for the defendant Iva Ikuko Toguri D'Aquino I examined George Noda, at my office in Room 335, Mitsui Main Bank Building, Tokyo, Japan, on the fifteenth day of April, A.D. 1949, and that the said witness being to me personally known and known to me to be the same person named and described in the interrogatories, being by me first sworn to testify the truth, the whole truth, and nothing but the truth in answer to the several interrogatories and cross-interrogatories in the cause in which the aforesaid stipulation, court order, and request for deposition issued, his evidence was taken down and transcribed under my direction by Irene Cullington, a stenographer who was by me first duly sworn truly and impartially to take down in notes and faithfully transcribe the testimony of the said witness George Noda, and after having been read over and corrected by him, was subscribed by him in my presence; and I further certify that I am not counsel or kin to any of the parties to this cause or in any manner interested in the result thereof.

In witness whereof, I have hereunto set my hand and seal of office at Tokyo, Japan, this 30th day of April, A.D. 1949.

/s/ THOMAS W. AINSWORTH,
Vice Consul of the United
States of America.

[American Consular Service Seal]

Service No. 707; Tariff No. 38; No fee prescribed.

[Endorsed]: Filed May 5, 1949.

In the Southern Division of the United States
District Court for the Northern District of
California

No. 31712 R

UNITED STATES OF AMERICA,

Plaintiff,

vs.

IVA IKUKO TOGURI D'AQUINO,

Defendant.

DEPOSITION OF LILY GHEVENIAN

Deposition of Lily Ghevenian, taken before me, Thomas W. Ainsworth, Vice Consul of the United States of America, in Mitsui Main Bank Building, Room 335, in Tokyo, Japan, under the authority of a certain stipulation for taking oral designations abroad, and upon order of the United States Dis-

trict Court, made and entered March 22, 1949, in the matter of United States of America vs. Iva Ikuko Toguri D'Aquino, pending in the Southern Division of the United States District Court, for the Northern District of California, and at issue between the United States of America vs. Iva Ikuko Toguri D'Aquino.

The plaintiff appearing by Frank J. Hennessey, United States District Attorney; Thomas DeWolfe, Special Assistant to the Attorney General, and Noel Story, Special Assistant to the Attorney General, and the defendant, appearing by Wayne N. Collins and Theodore Tamba.

The said interrogations and answers of the witness thereto were taken stenographically by Marion A. Peterson and were then transcribed by her under my direction, and the said transcript being thereafter read over correctly to said witness by me was then signed by said witness in my presence.

It is stipulated that all objections of each of the parties hereto, including the objections to the form of the questions propounded to the witness and to the relevancy, materiality and competency thereof, and the defendant's objections to the use of the deposition or any part of the deposition, by plaintiff, on the plaintiff's case in chief, shall be reserved to the time of trial in this cause.

LILY GHEVENIAN

of Tokyo, Japan, employed at GHQ, SCAP, of lawful age, being by me first duly sworn, deposes and says:

Questions propounded by Mr. Tamba:

Q. Your name is Lily Ghevenian?

A. Yes.

Q. Were you ever known by any other name?

A. Yes; Lily Sagoyan.

Q. Where do you reside? A. In Tokyo.

Q. How long have you resided in Tokyo?

A. I was born here.

Q. What is your nationality?

A. Stateless.

Q. Will you explain?

A. My father was Armenian and my mother was Japanese.

Q. Where and with whom are you employed?

A. GHQ, in Tokyo.

Q. Do you know Iva Toguri, also known as Iva D'Aquino? A. Yes.

Q. And when did you first meet her?

A. The latter part of 1943.

Q. Were you ever employed by Radio Tokyo?

A. Yes.

Q. Over what period of time did that employment continue?

A. From latter 1943 until September, 1945.

Q. What were your duties at Radio Tokyo?

A. Typist.

(Deposition of Lily Ghevenian.)

Q. Did you work steadily from 1943? [2*]

A. Yes.

Q. What were your hours per day?

A. Every other day from 8 to 5; night shift from 12 noon to 8 p.m.

Q. How many days per week?

A. Five and one-half days per week.

Q. Was Miss Toguri employed by Radio Tokyo?

A. Yes, she was.

Q. What work did she do when she first started there?

A. She was there before I was; when I came, she was broadcasting.

Q. Was Miss Toguri ever employed as a typist?

A. I don't know.

Q. Did you know what her hours of employment were?

A. Early in the evening; she went home right after the broadcast.

Q. Did you have occasion to type any scripts for her? A. I did.

Q. Do you know who prepared that script for her? A. I don't know.

Q. Who brought the script to you to be typed?

A. Ken Oki or Miss Toguri.

Q. What program did Miss Toguri broadcast?

A. The Zero Hour.

Q. Do you know how many days a week Miss Toguri worked at the radio station?

* Page numbering appearing at bottom of page of original Reporter's Transcript.

(Deposition of Lily Ghevenian.)

A. She was sick quite a while; she was supposed to have worked six days a week.

Q. Do you recall when Miss Toguri was sick, approximately? If you don't know, say so.

A. I don't know the exact date, but she was away a long time when Cousens was away.

Q. Do you remember when Cousens was away?

A. No, I don't.

Q. How long would these absences be, a week, or two, or three? A. It was weeks. [3]

Q. Now, when this script was delivered to you for Miss Toguri's program, how was it prepared?

A. It was typewritten.

Q. What kind of paper was it on?

A. Tissue paper—onion skin sheets.

Q. Then what would you do with this?

A. I made six or seven copies to be distributed.

Q. Do you know what became of the original?

A. Either Miss Toguri or Ken Oki took it back.

Q. Did you ever see the original of that script again? A. No, I never did.

Q. And you have testified that you did not know who prepared the script? A. Yes.

Q. When was that script brought to you?

A. About anywhere between 5 and 6 p.m.; sometimes Miss Toguri brought them in at the last minute.

Q. Do you know when the Zero Hour was broadcast? A. It was 6 p.m.

(Deposition of Lily Ghevenian.)

Q. Was the script brought to you before the broadcast?

A. A few times it was brought in afterwards.

Q. How long was that Zero Hour program?

A. I think it was from 6 to 6:30.

Q. Did you ever listen to the Zero Hour program? A. Yes, I did.

Q. Did you ever listen to Mrs. D'Aquino broadcast? A. Yes, I did.

Q. What did she broadcast, if you remember?

A. She broadcasted music introductions.

Q. Did you ever hear Mrs. D'Aquino discuss the nature or the quality of that program with anyone? A. I do not know.

Q. Did you ever hear Mrs. D'Aquino broadcast a motion picture involving war? [4]

A. I do not remember.

Q. Did you ever hear Mrs. D'Aquino speak or broadcast into a microphone, referring to the enemies of Japan? A. No, I haven't.

Q. Did you ever see her prepare a script regarding the loss of ships? A. No, I haven't.

Q. Did you ever hear her broadcast anything regarding the high cost of living in the United States? A. No, I have not.

Q. Or anything regarding soldiers in the South Pacific suffering from jungle rot and malaria?

A. Not that I remember.

Q. Did you ever hear her broadcast anything about the unfaithfulness of wives left at home?

(Deposition of Lily Ghevenian.)

A. No, I did not hear it.

Q. Or prostitution existing in the United States, in the factory areas of the United States?

A. No, I did not hear that.

Q. Miss Ghevenian, do you remember an occasion on the Zero Hour program when the program was interrupted for a flash news item, regarding the fall of Saipan?

A. Not the exact date, but I remember such an incident.

Q. What happened?

A. They broadcast "Stars and Stripes Forever."

Q. What happened around the radio station after that?

A. Everyone made a fuss about that and naturally didn't like it.

Q. Do you know what the Kempeitai was during the war? A. Yes, I do.

Q. What was the Kempeitai?

A. They were the gendarmes.

Q. Did you ever suspect that you were being watched by the Kempeitai? A. Yes. [5]

Q. Were you ever apprehended by the Kempeitai? A. No, I have not.

Q. I mean outside of the radio station?

A. I was caught in Yokohama once.

Q. Under what circumstances were you caught?

A. I did not have a pass to go there.

Q. Were you detained by the Kempeitai on that occasion? A. Just for about five minutes.

(Deposition of Lily Ghevenian.)

Q. Then you were released? A. Yes.

Q. Whom did you suspect might be Kempeitai agents in Radio Tokyo?

Mr. DeWolfe: Objection to that as incompetent, irrelevant and immaterial, calling for the conclusion.

The Court: The objection will be sustained.

(A. Buddy Uno and Ruth Hayakawa, and some other people I don't know their names.)

Q. Were you conscious of the fact that you were being watched? A. Yes, I was.

Q. Did you ever have a discussion with Iva D'Aquino, regarding Kempeitai's following you or her or both of you?

A. I remember once telling her I was watched by the Kempeitai.

Q. What did she say to you?

A. I don't remember.

Q. Who was on the Zero Hour program—I mean, what was the cast, if you know?

A. Ken Oki, Norman Reyes and Iva Toguri, and Charles Cousens, and I don't remember the rest.

Q. Do you remember any other girls on the program, besides Miss Toguri?

A. In the last part—toward the end of the war, Mrs. Oki, or Mieko Furuya—she used to take her parts when Iva was not there.

Q. Do you know of any other girls who might have taken Iva's parts? A. I do not.

Q. Do you know Mary Ishii?

A. I know Mary.

(Deposition of Lily Ghevenian.)

Q. Was she on that program?

A. I don't know. [6]

Q. What did Mr. Nakamoto do on the program?

A. I think he was in charge of the program.

Q. What did Mr. Oki do on the program?

A. He broadcasted news.

Q. Miss Ghevenian, you've heard me mention certain things regarding the broadcast of loss of ships, malaria, high cost of living, prostitution, etc.—did any of the scripts handed to you by Miss Toguri contain any reference to such things?

A. No.

Q. Are you sure of that? A. Yes.

Q. Why?

A. Because if there was such an item in it, I would have discussed it with another typist.

Q. Who was that typist?

A. Mary Higuchi.

Q. Did you ever have any discussion with Mrs. Oki during the times she substituted for Miss Toguri? A. That's right.

Q. How did she act?

A. She acted very proud of the fact that she was substituting for Miss Toguri.

Q. Miss Ghevenian, did Iva D'Aquino ever discuss the war with you, or the outcome of the war?

A. Yes, she has.

Q. What did she say on those occasions?

A. She used to tell me America would never lose. She said if you watch American boys play-

(Deposition of Lily Ghevenian.)

ing footabll, you know that they'll fight to the last man.

The Court: We will now take a recess until two o'clock. The jurors may be excused.

(Thereupon a recess was taken until 2 p.m. this day.)

Q. In any of her discussions with you, was she pro-Japanese? A. No, she was not.

Q. Did she ever express her feelings regarding the Japanese? [7]

A. She did not like them.

Mr. DeWolfe: I move to strike that as not responsive.

The Court: Let it go out and let the jury disregard it.

Q. Did you ever know of occasions when Miss Toguri took food to Prisoners of War?

A. I did not know it at that time, but I learned afterwards.

Q. What did she do in order to get the food there?

Mr. DeWolfe: I object to that as hearsay, sir, because of the last answer. The answer before that question was: "I did not know it at that time but I learned afterwards."

The Court: Submitted?

Mr. Collins: Yes.

The Court: The objection is sustained.

Mr. Collins: The prior question, if your honor

(Deposition of Lily Ghevenian.)

please, related to "Did she ever express her feelings?", and the answer that was stricken was, "She did not like them." This question is, "Did you ever know of occasions when Miss Toguri took food to prisoners of war?" "Answer: I did not know it at the time, but I learned afterwards."

The Court: What she learned afterwards is hearsay.

"Q. Where did you learn that?"

"A. From Ruth Hayakawa."

Mr. DeWolfe: I object to that as hearsay, in the same manner.

The Court: Let it go out and let the jury disregard it.

(A. She had to escape from the Kempeitai.)

Q. Where did you learn that?

A. From Ruth Hayakawa.

Q. Do you know a man by the name of Ken Oki?

A. Yes.

Q. Did you ever have a discussion with Mr. Oki after his return from the United States, where he was supposed to have testified against Miss Toguri before a United States Grand Jury?

A. Yes, I have talked to him afterwards.

Q. What was said to you by him on those occasions?

A. He said he had a "good time" and "Why don't you have a free ride to the United States too?"

Q. What did you say to him?

(Deposition of Lily Ghevenian.)

A. I said I do not want to go on a free ride.

Q. Miss Ghevenian, were there other girls, who broadcast on other programs while you were there?

A. Yes.

Q. Do you recall the names of any of those girls?

A. June Suyama, Ruth Hayakawa, Kathleen Fujiwara and Mrs. Oki.

Q. Do you remember a girl, who used to broadcast on the German Hour program?

A. Yes, I do.

Q. Who was she? A. Yoneko Matsunaga.

Q. Where is that girl today?

A. The last I heard, she was in New Jersey.

Q. What has become of June Suyama?

A. I recently heard she was killed in a car accident. [8]

Q. Do you know when the German Hour program was broadcast?

A. It was right after the Prisoners' Hour.

Q. Did this girl resemble Miss Toguri in stature or features? A. I do not know.

Cross-Examination

By Mr. Story:

Q. These scripts that you typed for Miss Toguri—how did they come to you; were they typed or handwritten?

A. Always typewritten.

Q. Did Miss Toguri ever tell you that she wrote some of her scripts? A. No, she never did.

(Deposition of Lily Ghevenian.)

Q. When did Mr. Cousens leave the radio station?
A. I do not know.

Q. Will you give us your best recollection—was it in 1943, 1944 or 1945?

A. I believe it was around 1944.

Q. Now, approximately when in 1944?

A. I do not remember.

Q. Now, you mentioned that Miss Toguri was away from the radio station for some weeks. Was this the only time she was away for any extended time?
A. No, she was away another time.

Q. When was Miss Toguri away the first time you mentioned?

A. That was when Cousens was away in the hospital.

Q. Could that have been in the Spring of 1945?

A. I don't remember.

Q. Now, the other time that you referred to when Miss Toguri was away from the station—how long was she away from the station?

A. Approximately three weeks.

Q. Can you give us the date of that absence?

A. I cannot, but that was the time she got married.

Q. Where was your office located with reference to the broadcasting studio?

A. The broadcasting studio was on the first floor and I believe it was the third floor where we were.

Q. Did you have any official duties at all on the first floor? [9]
A. No.

(Deposition of Lily Ghevenian.)

Q. Then it is quite possible that Miss Toguri could have been there all the time?

A. On those occasions, it was usually somebody else broadcasting. I know, because the voice that came through the monitor was not hers.

Q. Was there a monitor—speaker—in your office?

A. Yes, there was. There was one all over the building.

Q. Was this speaker on on times when the Zero Hour was being broadcast?

A. It was on all day and night.

Q. Did this noise disturb the girls in the typing pool? A. No, it didn't—it wasn't on so loud.

Q. You have testified that during the time you worked at the radio station, one day you would work from 8 to 5 in the afternoon and on the other day you would work from 12 noon to 8 p.m. Was this year schedule all the time you worked at the station?

A. We took the afternoon shift every other day and on Sundays we took turns.

Q. Did you have any official capacity in monitoring the program? A. No, I did not.

Q. You testified that Miss Toguri was ill and away from the station after Major Cousens left—you have testified, for some weeks—approximately how many weeks? Could it have been two weeks?

A. I don't know.

(Deposition of Lily Ghevenian.)

Q. Could you give us your best recollection as to how long it was?

A. I should say about a month and a half.

Q. Were you ever actually present in the radio studio, when the Zero Hour program was being broadcast?

A. No, I have never seen Zero Hour being broadcast.

Q. Then, so far as you know, your only knowledge of the Zero Hour and the people who participated in it were the voices through the monitor?

A. That's right.

Q. Did any other typists in the typing pool ever type a script for the Zero Hour? [10]

A. Yes.

Q. What other typists typed the Zero Hour program scripts at times?

A. Anyone who had the time or who was free did them—or who didn't have a definite assignment to type for one person.

Q. Approximately what percentage of the scripts did you type for the Zero Hour, ten per cent, fifteen per cent?

A. Just a very few.

Q. You made reference in you direct testimony to the playing of the Stars and Stripes Forever after the fall of Saipan. Was Miss Toguri responsible for the playing of Stars and Stripes Forever at that time?

A. I do not know that.

Q. Do you know who played Stars and Stripes Forever?

(Deposition of Lily Ghevenian.)

A. George Ozasa.

Q. In your direct examination you said—"Just a minute. I think the next questions on cross-examination relate to direct examination that was not allowed to be read.

The Court: It is stipulated it may be deleted.

Mr. DeWolfe: There is quite a bit of it. The next two items went out on direct examination and we are trying to enter into an agreement as to what portion of this we will skip as being pertinent to the part that was not read on direct examination.

The Court: Proceed, I will rule.

Mr. DeWolfe: I want to skip to page 12, line 5 because the matters in between that and what I last read concern a question on direct examination that was not read.

Mr. Collins: From line 14, page 11, down to and including line 4 on page 12.

The Court: It may go out.

Mr. DeWolfe: Yes, sir.

The Court: So stipulated.

Mr. Collins: I am not consenting that it go out. I am simply not opposing the objection made to that by Mr. DeWolfe on the ground that it is not proper cross-examination.

Mr. DeWolfe: I do not press that cross-examination because it related to matters objected to which was sustained on direct examination. Therefore I don't think it is necessary to read it. I ask that it go out of the record.

(Deposition of Lily Ghevenian.)

The Court: So stipulated?

Mr. Collins: I do not stipulate, if Your Honor please. I mean after objection is made I think Your Honor did make such a ruling.

The Court: Proceed.

(Q. In your direct examination, you said you suspected Mr. Uno of being a Kempeitai agent. Do you know definitely whether he was a Kempeitai agent? A. No.

Q. In your direct examination, you said you suspected Ruth Hayakawa of being a Kempeitai agent. Do you know definitely whether she was a Kempeitai agent?

A. I have learned since that she was not.

Q. Have you heard since that Mr. Uno was not?

A. Yes, I have heard he was not a Kempeitai.

Q. In other words, you had no reason to be frightened of those persons?

A. Mr. Uno used to wear a uniform around the station.

Q. Was this uniform a uniform of the Kempeitai?

A. The Kempeitai had the same uniform as the ordinary soldier did.

Q. Was that the type that Mr. Uno was wearing? A. Yes, it was.

Q. You have testified, in your direct examination, that Miss Toguri brought food to Prisoners of War. When did you hear about this—since the war? A. I heard it very recently.

(Deposition of Lily Ghevenian.)

Q. In 1949? [11]

(A. Yes.

Q. Of your own knowledge, do you know any occasion, when Miss Toguri supplied food to Prisoners of War?

A. I did not know, then I learned it later.)

Q. What did Miss Toguri call herself when she was broadcasting the Zero Hour?

A. She used to say, "This is Orphan Annie."

Q. Did she ever refer to herself as anything else on this program? A. No, she has not.

Q. Do you recall Miss Toguri referring to herself as "Ann," when she was broadcasting the Zero Hour? A. I do not remember that.

Q. Did Miss Toguri ever mention to you that she was under any duress to work at the radio station?

A. She mentioned once that Kempeis were watching her.

Q. Miss Ghevenian, do you recall making a statement to Frederick Tillman, of the Federal Bureau of Investigation, recently?

A. Yes, I have talked to him.

Q. Do you recall telling Mr. Tillman that Miss Toguri mentioned that she was never under any duress of any kind?

A. Yes, I have, but I recall a few incidents as I talk to you.

Q. Do you recall, also, at the same time that you told Mr. Tillman that Miss Toguri was treated

(Deposition of Lily Ghevenian.)

in the same manner as any other Japanese or Nesei working at the broadcasting station?

A. Yes, she was.

Q. Was that statement true?

A. I did not know at that time what "duress" meant.

Q. Was Miss Toguri treated like any other Japanese and Nisei working in the station?

A. We were all treated alike.

Q. When did you talk to Mr. Tillman?

A. About a month ago.

Q. Have you changed your statement, concerning duress, as a result of talking [12] to someone else?

A. Yes, I have.

Q. Do you know of your own knowledge that Miss Toguri was forced to work for Radio Tokyo?

A. I do not know that.

Q. Did you ever hear any of the employees at the radio station refer to Miss Toguri as "Tokyo Rose"?

A. We have talked about it and we thought she was "Tokyo Rose."

Q. Was that the general opinion around the radio station?

A. Yes, it was.

Q. Was Miss Toguri pleased with her success, with regard to broadcasting at Radio Tokyo?

A. She was always in a hurry and I did not notice that.

Q. Do you recall making a statement to Mr. Tillman, when you stated, and I quote: "Miss To-

(Deposition of Lily Ghevenian.)

guri talked to me about being referred to as "Tokyo Rose" and was happy about it and was all smiles."

Did you sign his statement? A. No, I did not.

Q. Do you not recall telling Mr. Tillman that?

A. No, I do not.

Q. Did you ever tell Mr. Tillman that Miss Toguri mentioned being "Tokyo Rose" over the air?

A. I remember one time she said such a thing.

Q. That she made such a statement over the air?

A. As far as I remember, she did.

Q. Did any police official or Kempeitai question you concerning Miss Toguri? A. No.

Q. Did you ever hear Miss Toguri broadcast, where she referred to the Ameican troops as the "Boneheads in the Pacific"?

A. No, I don't remember that.

Q. Do you recall any of the scripts that Miss Toguri broadcast where she referred to herself as "Your Enemy Ann"?

A. I don't remember that. [13]

Q. Do you recall anything that Miss Toguri said while she was introducing these recordings?

A. She was just introducing records and did not say anything else.

Q. Did she say anything that was designed to cause homesickness to the American troops?

A. No, she did not.

Q. Did you ever hear Miss Toguri say, in her broadcast, statements to the effect—wouldn't it be

(Deposition of Lily Ghevenian.)

nicer to be home with your girl friend, rather than fighting mosquitoes in the jungles?

A. I don't remember her saying that.

Q. Was any of that material in the scripts that you typed? A. No.

Redirect Examination

By Mr. Tamba:

Q. What kind of script did you type and for what programs?

A. I typed commentaries, news, dialogues and Prisoners' messages.

Q. Do you remember the date you talked with Mr. Tillman? A. About a month ago.

Q. Do you know where he got your name?

A. He got it from several people.

Q. Did you sign any statement?

A. I did not sign any statement.

Q. Did he ask you if the Nisei and people who were not Japanese Nationals were under constant fear of the Kempeitai?

A. I think he did; I don't remember.

Q. Did he use the word "duress"?

A. Yes, he did.

Q. Did you know what it meant?

A. I did not know at that time.

Q. Did you know of any Prisoners of War being slapped around Radio Tokyo?

A. In Radio Tokyo? No.

(Deposition of Lily Ghevenian.)

Q. Were any other girls referred to as "Tokyo Rose"?

A. In the radio station? [14]

Q. Yes.

A. They did not know who "Tokyo Rose" was.

Q. Were any of the other girls suspected of being "Tokyo Rose"?

A. Yes.

Q. Who were they?

A. Ruth Hayakawa and June Suyama.

Q. Any others?

A. That's all I remember.

Q. In answer to one of Mr. Story's questions, you said you heard Miss Toguri broadcast over the air that she was "Tokyo Rose"?

A. She did mention it; it was in the script.

Q. Do you know whose script that might have been?

A. No.

Q. Who brought you that script?

A. I do not remember whether it was Ken Oki or Iva.

Q. It could have been Ken Oki who brought the script that day?

A. Yes.

Q. But you don't recall who actually broadcast that remark?

A. I do not.

Q. Do you remember anything said by Miss Toguri when she handed you the script, as to whether she had read it?

A. Sometimes she told me to rush it, because she had not read the script yet.

(Deposition of Lily Ghevenian.)

Recross-Examination

By Mr. Story:

Q. Have you talked to Miss Toguri's husband since you were interviewed by Mr. Tillman?

A. I met Mr. D'Aquino at Mr. Tamba's office.

Q. Did you have a discussion with Mr. D'Aquino at that time? A. No, I did not.

Q. Have you talked to Mr. D'Aquino at any other time?

A. I met him at Mr. Tamba's hotel and that's the only time I saw him.

Redirect Examination

By Mr. Tamba:

Q. Miss Ghevenian, you have talked to many people about this? [15] A. Yes.

Q. You've come to my hotel on one occasion and again this morning? A. Yes.

Q. And the first time you came to my hotel, there were many people present, weren't there?

A. I remember only three persons other than Mr. Tamba—Nakamura, Ono and D'Aquino.

Q. I asked you what you knew about the case?

A. Yes.

Q. And no one has told you what to testify?

A. No.

Q. And you were told to testify to the truth and nothing but the truth? A. Yes.

Q. You have had discussions with outsiders and

(Deposition of Lily Ghevenian.)

other people, regarding this case, and you asked other people why they were testifying against Iva when she did nothing wrong?

A. Yes, I have talked to them.

Q. And what did they tell you in substance?

Mr. DeWolfe: Objected to as hearsay.

The Court: Submitted?

Mr. Collins: Yes.

The Court: The objection is sustained.

(A. These people who testify against her, they told me to go ahead and have a good time and get a free ride to the United States like they did.)

Q. Will you tell us who those people are, if you remember? A. Ken Oki did.

Q. Anyone else?

A. Other people who went on that trial won't even say "Hello" to me.

Q. They are trying to avoid you?

A. That's right.

Q. Who is trying to avoid you?

A. Nakamoto.

Q. Anyone else, if you know? A. No.

/s/ LILY GHEVENIAN. [16]

Japan,

City of Tokyo,

American Consular Service—ss:

I do solemnly swear that I will truly and impartially take down in notes and faithfully tran-

scribe the testimony of Lily Ghevenian, a witness now to be examined, so help me God.

/s/ MARION A. PETERSON.

Subscribed and sworn to before me this eighteenth day of April, A.D. 1949.

/s/ THOMAS W. AINSWORTH,

Vice Consul of the United
States of America.

[American Consular Service Seal.]

Service No. 578a; Tariff No. 38; No fee prescribed.

Japan

City of Tokyo,

American Consular Service—ss.

CERTIFICATE

I, Thomas W. Ainsworth, Vice Consul of the United States of America in and for Tokyo, Japan, duly commissioned and qualified, acting under the authority of a certain stipulation for taking oral designations abroad, and upon order of the United States District Court, made and entered March 22, 1949, in the Matter of United States of America, Plaintiff, vs. Iva Ikuko Toguri D'Aquino, Defendant, pending in the Southern Division of the United States District Court, for the Northern District of California, and at issue between United States of America vs. Iva Ikuko Toguri D'Aquino, do hereby certify that in pursuance of the aforesaid stipulation and court order and at the request of Theodore Tamba, counsel for the defendant Iva Ikuko Toguri

D'Aquino I examined Lily Ghevenian, at my office in Room 335, Mitsui Main Bank Building, Tokyo, Japan, on the eighteenth day of April, A.D. 1949, and that the said witness being to me personally known and known to me to be the same person named and described in the interrogatories, being by me first sworn to testify the truth, the whole truth, and nothing but the truth in answer to the several interrogatories and cross-interrogatories in the cause in which the aforesaid stipulation, court order, and request for deposition issued, her evidence was taken down and transcribed under my direction by Marion A. Peterson, a stenographer who was by me first duly sworn truly and impartially to take down in notes and faithfully transcribe the testimony of the said witness Lily Ghevenian, and after having been read over and corrected by her, was subscribed by her in my presence; and I further certify that I am not counsel or kin to any of the parties to this cause or in any manner interested in the result thereof.

In witness whereof, I have hereunto set my hand and seal of office at Tokyo, Japan, this second day of May, A.D. 1949.

/s/ THOMAS W. AINSWORTH,
Vice Consul of the
United States of America.

[American Consular Service Seal.]

Service No. 743; Tariff No. 38; No fee prescribed.

[Endorsed]: Filed May 9, 1949.

In the Southern Division of the United States
District Court for the Northern District of
California

No. 31712 R

UNITED STATES OF AMERICA,

Plaintiff,

vs.

IVA IKUKO TOGURI D'AQUINO,

Defendant.

DEPOSITION OF RUTH HAYAKAWA

Deposition of Ruth Hayakawa, taken before me, Thomas W. Ainsworth, Vice Consul of the United States of America, in Mitsui Main Bank Building, Room 335, in Tokyo, Japan, under the authority of a certain stipulation for taking oral designations abroad, and upon order of the United States District Court, made and entered March 22, 1949, in the matter of United States of America vs. Iva Ikuko Toguri D'Aquino, pending in the Southern Division of the United States District Court, for the Northern District of California, and at issue between the United States of America vs. Iva Ikuko Toguri D'Aquino.

The plaintiff appearing by Frank J. Hennessey, United States District Attorney; Thomas DeWolfe, Special Assistant to the Attorney General, and Noel Story, Special Assistant to the Attorney General, and the defendant, appearing by Wayne N. Collins and Theodore Tamba.

The said interrogations and answers of the wit-

ness thereto were taken stenographically by Marion A. Peterson and were then transcribed by her under my direction, and the said transcript being thereafter read over correctly to said witness by me, was then signed by said witness in my presence.

It is Stipulated that all objections of each of the parties hereto, including the objections to the form of the questions propounded to the witness and to the relevancy, materiality and competency thereof, and the defendant's objections to the use of the deposition or any part of the deposition, by plaintiff, on the plaintiff's case in chief, shall be reserved to the time of trial in this cause.

SUMI RUTH HAYAKAWA

of Tokyo, Japan, engaged in foreign trade of lawful age, being by me first duly sworn, deposes and says:

Questions propounded by Mr. Tamba:

Q. Your name is Ruth Hayakawa?

A. Yes; Sumi Ruth Hayakawa.

Q. And you live at Tokyo? A. Yes.

Q. And you are in business in Tokyo?

A. That's right.

Q. And you are one of the directors of the Yanase Export and Import Company, Limited?

A. That's right.

Q. And you are also engaged in other businesses?

(Deposition of Sumi Ruth Hayakawa.)

A. That's right; Director of Imperial Enterprises and Agent for the Vulcan Trading Company, India.

Q. And you were born in Japan? A. Yes.

Q. And you are a citizen of Japan?

A. Yes.

Q. You were educated in the United States. Where? A. Los Angeles.

Q. And how long have you resided in Japan?

A. Since my return to Japan in 1941.

Q. Were you ever employed by Radio Tokyo?

A. Yes.

Q. When did you enter the employ of Radio Tokyo? A. Mid-April, 1943.

Q. And how long were you employed with Radio Tokyo? [2*]

A. I was officially employed until April, 1945.

Q. Are you acquainted with Iva D'Aquino?

A. Yes, I am.

Q. When did you meet her?

A. I met her in the Summer of 1943.

Q. Where? A. At the radio station.

Q. What was she doing at that time?

A. She came in as a typist and I believe she was a typist when I met her.

Q. Do you know whether or not she ever participated in a radio broadcast known as the Zero Hour? A. Yes.

Q. When did she start broadcasting on the Zero

* Page numbering appearing at bottom of page of original Reporter's Transcript.

(Deposition of Sumi Ruth Hayakawa.)

Hour? A. I think, in the Fall of 1943.

Q. And how long was she on this program?

A. She was there when I left in February, 1945.

Q. Do you know who was in the cast of that program?

A. Yes; Norman Reyes and Iva, Ken Oki, George Nakamoto, Mr. Oshidari, Ken Ishii, Sash Moriama.

Q. Were there any women, besides Iva, on that program? A. Yes, Mieko Furuya.

Q. Was she Mrs. Oki? A. Yes.

Q. Was Mary Ishii on that program?

A. Not while I was there.

Q. Was Mrs. Norman Reyes?

A. She was on the announcing staff; she might have pinch-hit for Iva.

Q. Did you ever?

A. Yes; in the Fall of 1943, when Iva started to broadcast, I took over the Sunday evening broadcast in Iva's absence.

Q. Did you ever, on any other occasion?

A. I believe I did. [3]

Q. Do you know of any other women who substituted for Iva in her absence?

A. Mieko Furuya (Mrs. Oki) might have.

Q. Do you know of any others?

A. I doubt whether the other women substituted.

Q. Were there any other women announcers in Radio Tokyo, besides you and the others you mentioned?

(Deposition of Sumi Ruth Hayakawa.)

A. Yes; there was June Suyama and Kay Fujiwara, and Margaret Kato, and Kathryn Muraoka (Mrs. Reyes).

Q. Do you know the girl who broadcast on the German Hour? A. Yes.

Q. What was her name?

A. Matsunaga; I can't think of her first name.

Q. Do you know where that girl is today?

A. I heard, in New Jersey.

Q. Do you know where June Suyama is?

A. She died about a year ago.

Q. Do you know a man, named Takano?

A. Yes, I did.

Q. Who was he?

A. He was personnel employment chief—head of personnel employment at Radio Tokyo.

Q. Where is that man today?

A. He died in 1944 or 1945, during the air-raid.

Q. Incidentally, when did the air-raids increase in intensity in this area?

A. The first air-raid was in November, 1944, and then again in January and February, 1945, then I left Tokyo. Judging from the paper, it continued in March and April.

Q. Did you ever return to Tokyo in March and April?

A. I returned to Tokyo the first of April and there was a severe air-raid that night and several during my two weeks' stay in Tokyo.

Q. Do you know a man by the name of Major Cousens? A. Yes, I do. [4]

(Deposition of Sumi Ruth Hayakawa.)

Q. Who was he?

A. He was a Prisoner of War, who was working at the radio station.

Q. Did he train you to broadcast?

A. No, he did not train me at the beginning—it was Ted Wallace who trained me. Later Major Cousens assisted me when I read commentaries.

Q. When he assisted you, will you tell me what he did?

A. He coached me, by asking me to read and re-read his commentaries, telling me where to emphasize and where to pause.

Q. Do you know who coached or trained Mrs. D'Aquino?

A. I heard that both the Prisoners of War worked with Mrs. D'Aquino, coaching her for radio.

Q. Did you ever see her with either of these two men—coaching or training Mrs. D'Aquino?

A. Yes, I think I have. I remember Ted Wallace assisted Iva at the microphone.

Q. What kind of a microphone voice did Mrs. D'Aquino have, if you know?

A. I didn't think it was good.

Mr. DeWolf: Move that go out as a conclusion and opinion.

The Court: What she thought of the voice may go out. The objection will be sustained. The jury will disregard it.

Q. Do you remember Mrs. D'Aquino being away from the radio station for periods of time?

(Deposition of Sumi Ruth Hayakawa.)

A. Yes; I didn't know for what reasons, but she was frequently away from the station. The staff complained about her absences, especially Ken Oki.

Q. When you substituted for Mrs. D'Aquino, who selected your records?

A. I believe Cousens or Ted Wallace selected the records and made the script, which I read.

Q. Do you know who was the Saturday Night Party Girl? A. Mrs. Oki.

Q. What did she do on the program?

A. She came on every Saturday, as Saturday Night Party Girl Betty.

Q. Did she introduce records?

A. Yes, she introduced music.

Q. Did you see Prisoners of War around that radio broadcasting room?

A. The only Prisoners of War around during the Zero Hour, during the late afternoon—they were Wallace and Cousens. There were other Prisoners of War around at other times, who used the same studio. They were around during the early afternoon, whereas the Zero Hour Prisoners of War were late afternoon. [5]

Q. Who was in charge of the Prisoners of War?

A. I don't know, in the late afternoon.

Q. Did you ever see Nakamoto with the Prisoners of War?

A. Nakamoto had his private room, in which Cousens and Wallace worked.

(Deposition of Sumi Ruth Hayakawa.)

Q. Do you know what the Kempeitai was during the war?

A. The Kempeitai was the Japanese Army policemen.

Q. Were you ever apprehended by the Kempeitai?

Mr. DeWolfe: I object to that as incompetent, irrelevant and immaterial, improper, not germane to the issue.

Mr. Collins: I will point out that if she was there at the time, as the testimony indicates, the activities of the Kempeitai would be pertinent to the issue.

Mr. DeWolfe: As to what they did, on this particular witness that has nothing to do with the defendant.

Mr. Collins: Well, I think that the next answer would explain that. I mean, I think the answer itself would explain that.

The Court: I will strike it out if it has no place in the record. Read it.

A. Yes, I was questioned by the Kempeitai in April, 1945, and detained over night. They called me in because I frequented the Swedish Legation, but most of the questioning was concerning Radio Tokyo. They wanted to know who in Radio Tokyo were Pro-American and who was whispering that Japan was losing the war.

The Court: Proceed, the question and answer may stand.

(Deposition of Sumi Ruth Hayakawa.)

Q. Do you know if Mrs. D'Aquino broadcasted any propaganda and anything detrimental to the United States?

A. No, I have not heard her broadcast anything detrimental to America.

Q. Do you know of any incidents wherein Mrs. D'Aquino indicated that she was in fear of the Kempeitai?

A. She never told me outright, except on one occasion—that was when we of the radio station had a party at Kathryn Muraoka's home. Everybody started to dance, but when Iva was asked to dance, she refused; so I asked her why she didn't dance, and she said that dancing was prohibited and the Kempeitai would call us or pick on us if we danced.

Q. Did you ever see Kempeitais or persons suspected of being Kempeitais around the radio station, while you were there?

A. Yes, there were many Kempeitais and a few were pointed out to me as Kempeitais. Also, we did not know among ourselves who were Kempeitais.

Q. Do you recall who was pointed out to you as Kempeitai or suspected of being Kempeitais?

A. I don't recall the names or faces of the Kempeitai, there were so many around the radio station, but among the employees of the radio station, I personally had a feeling that Mr. Nii was assisting the Kempeitai; I was afraid to talk to him. [6]

Q. While you were at the radio station, did you ever hear anyone mention the name "Tokyo Rose?"

A. Yes. I first heard the name "Tokyo Rose"

(Deposition of Sumi Ruth Hayakawa.)

in 1944, when Ken Oki asked me whether I had read the newspapers of that day. I recall definitely that it was Sunday evening and when I told Ken Oki that I had not seen the papers, he showed me a copy of news that came in from the Foreign Office, which said the G.I.s in the South were enjoying the radio programs from Tokyo, especially the music and the voice of a young lady, and this article said that the woman's voice was very soft and appealing and they liked her program, and they wondered who "Tokyo Rose" was; so, I recall asking Ken who was "Tokyo Rose" and Ken told me that it was I, because the article said Sunday evening and I was on the Sunday evening program; and, also, Ken pointed out that my voice was soft and appealing, whereas Iva's voice was not.

Q. Do you recall Mr. Oki, on another occasion, saying: "Boys, we are making history; the monitor picked up the 'Tokyo Rose' story. A Seattle store would like to sponsor the program."?

A. No, I do not recall.

Q. Do you remember Ruth Matsunaga, who was the girl on the German Hour, I believe?

A. I don't know whether her first name was Ruth or not, but her last name was Matsunaga.

Q. Did she resemble Mrs. D'Aquino?

A. Yes, she was round-faced and plump, like Iva was—more inclined to be square-jawed.

Q. Do you recall whether or not Mrs. D'Aquino had difficulty with the Japanese language?

(Deposition of Sumi Ruth Hayakawa.)

A. Yes. I don't believe she knew the language as well as I, and I am pretty poor.

Q. Do you know whether she was registered as an alien with the Japanese police and needed travel permits, in order to leave the city?

A. Yes, I think I knew that; I don't know whether I heard it from her or [7] others, but I knew that she was registered as an alien and had difficulty traveling in Tokyo.

Q. Did you know a Charles Yoshii?

A. Yes, Chuck Yoshii was at the radio station for many years before I came and was considered one of our best announcers.

Q. Did you know a George Noda?

A. Yes, George Noda, I believe, entered the radio station a few months before I did.

Q. What did he do at the radio station?

A. George Noda was on the announcing staff, reading news and commentaries.

Q. Did you know a Dorsey Kurokawa?

A. Yes, Dorsey Kurokawa came to the radio station in the latter part of 1944 and was on the regular announcing staff, reading news and commentaries.

Q. What type of music was introduced by Mrs. D'Aquino?

A. Iva's program consisted of jazz and popular music, and light operas and semi-classics.

Q. Did you know a Mrs. Topping?

A. Yes, I know her very well.

(Deposition of Sumi Ruth Hayakawa.)

Q. Was she connected with Radio Tokyo?

A. Mrs. Topping was not connected with Radio Tokyo, but she came in periodically to broadcast.

Q. Did you accompany Mrs. Topping to and from the radio station on those occasions?

A. Yes, I was always with Mrs. Topping when she came to the radio station.

Q. Did you ever help Mrs. Topping prepare scripts?

A. I have helped Mrs. Topping a few times with her script, typing them for her.

Q. Did you know a Miss Ward? A. Yes.

Q. Who was she?

A. Miss Ward was living with Mrs. Topping and is a pianist.

Q. Did she ever come to the radio station? [8]

A. Yes, Miss Ward has played the piano over the air a few times.

Q. Did you have occasion to observe whether or not Mrs. D'Aquino was friendly with the Japanese personnel around Radio Tokyo, or was she more friendly with Prisoners of War?

A. No, she was not friendly with the Japanese; she was always polite to all of us, but kept herself away from our large staff room and confined herself to the Zero Hour staff room and the Prisoners of War.

Q. Miss Hayakawa, you had occasion a number of times to take food and things to Prisoners of War, did you not?

A. While the three Prisoners of War, Cousens,

(Deposition of Sumi Ruth Hayakawa.)

Wallace and Reyes were in our large staff room, when I entered Radio Tokyo, I felt sorry for their food situation, and they often spoke of the lack of vegetables, so I used to buy fresh vegetables and pass it to them. Later I passed several American magazines which I had brought back from the States to the Prisoners of War.

Q. And that was done secretly? A. Yes.

Q. Did you know of Mrs. D'Aquino doing the same thing?

A. She might have, but she would not have said anything about it, just as I have never told what I had done.

Q. You told me that the other day and that is one of the first times you've mentioned it?

A. Yes.

Q. Did you ever recall Mrs. D'Aquino broadcasting over the radio about the loss of ships?

A. No, I have never heard her broadcast anything but music announcements.

Q. Were you present in the radio station when the fall of Saipan was announced by the Japanese Government as flash news and when the Zero Hour program was interrupted for that occasion?

A. I heard about it, but I don't believe I was there that day—I don't believe so, it may have been my day off.

Cross-Examination

By Mr. Story:

Q. Miss Hayakawa, you mentioned the names

(Deposition of Sumi Ruth Hayakawa.)

of several female announcers at Radio Tokyo. Were any of these people regular participants on the Zero Hour? [9]

A. No, the women announcers on the Zero Hour were only Iva D'Aquino and Mieko Oki.

Q. Did Mrs. Oki have a regular part in all the programs?

A. Yes, after she joined the Zero Hour staff, she no longer belonged to our regular announcers staff.

Q. Did she participate every day after she joined or did she work from time to time?

A. She was not on daily, but confined to Saturday night, except when she substituted for Mrs. D'Aquino, in Mrs. D'Aquino's absence. But she was at the radio station every day. I used to see her every day. We were quite friendly.

Q. Was the Sunday broadcast, at the time Zero Hour was usually broadcast, called the Zero Hour program?

A. No. Zero Hour program was the program of music by Norman Reyes. To my knowledge, the entire program was not called the Zero Hour and the Zero Hour program on Sunday evenings followed the music program that I broadcasted for. The script was written by Cousens.

Q. When you were broadcasting, did you ever refer to yourself as "Orphan Ann"?

A. No, I have never referred to myself as "Orphan Ann." On Sunday evenings, it was a semi-classical music program.

(Deposition of Sumi Ruth Hayakawa.)

Q. Did you ever refer to yourself as "Ann" on any program?

A. I have never referred to myself as "Ann."

Q. In any of the broadcasts that Mrs. D'Aquino made, that you heard, did you ever hear the Americans referred to as the "Orphans of the Pacific"?

A. I don't recall specific details of any of her programs and can't say that I exactly remember.

Q. Did you ever hear her say in a broadcast—the Americans in the Pacific were "Bone Heads"?

A. No, I have never heard her call such names.

Q. Have you ever heard Mrs. D'Aquino make a broadcast, saying that it was a pity that the Americans were in the Pacific fighting mosquitoes rather than being home?

A. No, I don't recall such details of her script.

Q. What did Mrs. D'Aquino call herself on the radio?

A. In the earlier part of Mrs. D'Aquino's music program, she had no name, but later on they extended the program and she began to call herself as "Orphan Ann."

Q. Did any other announcer or any other participant use the name "Orphan Ann," other than Mrs. D'Aquino, to your knowledge?

A. To my knowledge, no one, other than Mrs. D'Aquino, called herself "Orphan Ann."

Q. Did you hear the Zero Hour program broadcast regularly?

(Deposition of Sumi Ruth Hayakawa.)

A. I heard the broadcast frequently, but not regularly.

Q. Did Mrs. D'Aquino ever tell you that she was forced to work in Radio Tokyo or under duress at any time?

A. She has never told me of being under duress or forced to broadcast, but I had the impression that she was. She's never talked very much to me of herself or of her program.

Q. Did you ever see anyone threaten Mrs. D'Aquino in any way, when she was at Radio Tokyo?

A. No, I have not. But no one has seen me being questioned by the Kempeitai either. They work very secretly.

Q. These Prisoners of War that you mentioned in your testimony, who worked in the radio station—what did they do?

A. Writing scripts and announcing, presenting skits and plays.

Q. These Prisoners of War, then, that Mrs. D'Aquino gave food to, were collaborators, were they not, with the Japanese Government?

A. They were working at the radio station by order of the Japanese Army, but I wouldn't call it collaborating.

Q. Did you ever see copies of the orders, ordering Prisoners of War to work for the Japanese Government?

A. No.

(Deposition of Sumi Ruth Hayakawa.)

Q. Then that is only an opinion of yours?

A. I guess so. [11]

Redirect Examination

By Mr. Tamba:

Q. Did you ever know that Mrs. Reyes broadcast on the Zero Hour?

A. She wasn't the regular announcer on the Zero Hour. I don't know whether she ever broadcasted or not.

Q. Were there any other girls who broadcast introductions to music on Radio Tokyo, besides Mrs. D'Aquino?

A. Yes, all the women announcers specialized in announcing music programs.

Q. What time of the day did you go on the air on Sundays?

A. My schedule of announcing programs changed frequently during my years at the radio station. There were Sundays when I had an afternoon symphony program (music concert) and then the Sunday Concert on the same transmission as the Zero Hour.

Q. That would be between 6 and 7 p.m.?

A. My recollection of that transmission was from 5:40 to 6—twenty minutes.

Q. How long was Mrs. D'Aquino's program, if you remember?

A. Her program was about twenty minutes.

Q. How many records did she play on the pro-

(Deposition of Sumi Ruth Hayakawa.)

gram, if you remember? A. I can't say.

Q. How many records did you play when your program was from 5:40 to 6 p.m.?

A. I think I usually played about six records.

Mr. Tamba addressing Mr. Story:

Now I'm asking these questions, Mr. Story, for the sole purpose of showing general conditions about the radio station and none other.

Redirect Examination

Continued

By Mr. Tamba:

Q. Did you ever tell anyone that you were arrested by the Kempeis?

A. I didn't mention my arrest until after the war was over.

Q. Were you in fear of the Kempeitai all of the time that you worked at the radio station?

Mr. DeWolfe: I object to that as immaterial, improper, irrelevant and incompetent.

The Court: The objection is sustained.

Mr. Collins: I might point out, if Your Honor please, that the witness has testified that the Kempeitai were at Radio Tokyo constantly and——

Mr. DeWolfe: I might say, Your Honor, about that, that the question was, "Were you in fear of the Kempeitai—", if Your Honor wishes to hear from me?

The Court: If counsel is through?

Mr. Collins: Yes. And I might say, it is a fairly long answer, if Your Honor please, but I think that

(Deposition of Sumi Ruth Hayakawa.)

it has a direct bearing upon the material issue and relates to the fact that there were Kempeitai agents at Radio Tokyo constantly. She so testified in the deposition and now she gives a complete explanation, together with certain details, that actually transpired at Radio Tokyo.

The Court: Read the question. I think I sustained the objection.

(Question reread by Mr. Collins).

The Court: The objection will be sustained.

Mr. Collins: That was the last question that appears on the original.

Mr. Tamba: That is it, that is the last question. The answer is quite long.

(A. I wasn't aware of fear of the Kempeitai until toward the end of 1943 and the rest of the time, and it was a constant dread from the Summer of 1944, in that you didn't dare to talk to anyone, whether they were your friends or not, of personal opinions or viewpoints. I remember one detail; the Prisoners of War asked me once what my pleasures were—what I did for (12] amusement—and I remember saying that flower arrangement was the only source of pleasure and recreation for me. That remark was considered unpatriotic by the Kempeitais and Mrs. Oki (Mieko Furuya), whom I considered one of my closest friends at the time, warned me that the Kempeitai might call me in and reprimand me for telling the Prisoners of War that. And for talking or being seen with the Pris-

(Deposition of Sumi Ruth Hayakawa.)

oners of war also. She said that the Kempeiti had told her to tell me. It scared me to the extent where I no longer went down to the studio to listen to their program, except only on the occasions when I was called in to participate in the Prisoners of War program. It was impossible to discuss interviews by the Kempeitai with anyone, because when I was detained by the Kempeitai, before they released me, I had to sign a statement which they wrote because I could not write Japanese, which they read to me and explained to me, which meant that I was not to tell anyone, not even my mother and father, that I was questioned and detained by the Kempeitai. If I told anyone about my detention, the Kempeitai will not be held responsible for anything that might happen to me. I had to sign that and put my thumb print on it. Of course, they told me to sign the statement, telling me incidents of people being questioned and detained and not coming out of the Kempeitai Headquarters alive.)

/s/ SUMI RUTH HAYAKAWA.

Japan,

City of Tokyo,

American Consular Service—ss:

I do solemnly swear that I will truly and impartially take down in notes and faithfully transcribe the testimony of Ruth Hayakawa, a witness now to be examined, So help me God.

/s/ MARION A. PETERSON.

Subscribed and sworn to before me this eighteenth day of April, A.D. 1949.

/s/ THOMAS W. AINSWORTH,

Vice Consul of the

United States of America.

[American Consular Service Seal.]

Service No. 577a; Tariff No. 38; No fee prescribed.

Japan,

City of Tokyo,

American Consular Service—ss:

CERTIFICATE

I, Thomas W. Ainsworth, Vice Consul of the United States of America in and for Tokyo, Japan, duly commissioned and qualified, acting under the authority of a certain stipulation for taking oral designations abroad, and upon order of the United States District Court, made and entered March 22, 1949, in the Matter of United States of America, Plaintiff, vs. Iva Ikuko Toguri D'Aquino, Defendant, pending in the Southern Division of the United States District Court, for the Northern District of California, and at issue between United States of America vs. Iva Ikuko Toguri D'Aquino, do hereby certify that in pursuance of the aforesaid stipulation and court order and at the request of Theodore Tamba, counsel for the defendant Iva Ikuko Toguri D'Aquino I examined Sumi Ruth Hayakawa, at my office in Room 335, Mitsui Main Bank Building,

Tokyo, Japan, on the eighteenth day of April, A.D. 1949, and that the said witness being to me personally known and known to me to be the same person named and described in the interrogatories, being by me first sworn to testify the truth, the whole truth, and nothing but the truth in answer to the several interrogatories and cross-interrogatories in the cause in which the aforesaid stipulation, court order, and request for deposition issued, her evidence was taken down and transcribed under my direction by Marion A. Peterson, a stenographer who was by me first duly sworn truly and impartially to take down in notes and faithfully transcribe the testimony of the said witness Sumi Ruth Hayakawa, and after having been read over and corrected by her, was subscribed by her in my presence; and I further certify that I am not counsel or kin to any of the parties to this cause or in any manner interested in the result thereof.

In witness whereof, I have hereunto set my hand and seal of office at Tokyo, Japan, this second day of May, A.D. 1949.

/s/ THOMAS W. AINSWORTH,
Vice Consul of the
United States of America.

[American Consular Service Seal.]

Service No. 746; Tariff No. 38; No fee prescribed.

[Endorsed]: Filed May 9, 1949.

In the Southern Division of the United States District Court for the Northern District of California.

No. 31712 R

UNITED STATES OF AMERICA,

Plaintiff,

vs.

IVA IKUKO TOGURI D'AQUINO,

Defendant.

DEPOSITION OF FOUMY SAISHO

Deposition of Foumy Saisho, taken before me, Thomas W. Ainsworth, Vice Consul of the United States of America, in Mitsui Main Bank Building, Room 335, in Tokyo, Japan, under the authority of a certain stipulation for taking oral designations abroad, and upon order of the United States District Court, made and entered March 22, 1949, in the Matter of the United States of America vs. Iva Ikuko Toguri D'Aquino, pending in the Southern Division of the United States District Court, for the Northern District of California, and at issue between the United States of America vs. Iva Ikuko Toguri D'Aquino.

The plaintiff, appearing by Frank J. Hennessy, United States District Attorney; Thomas DeWolfe, Special Assistant to the Attorney General, and Noel Story, Special Assistant to the Attorney General, and the defendant, appearing by Wayne N. Collins and Theodore Tamba.

The said interrogatories and answers of the witness thereto were taken stenographically by Irene Cullington and were then transcribed by her under my direction, and the said transcriptions being thereafter read over correctly to said witness by me and then signed by said witness in my presence.

It is Stipulated that all objections of each of the parties hereto, including the objections to the form of the questions propounded to the witness and to the relevancy, materiality and competency thereof, and the defendant's objections to the use of the deposition, or any part of the deposition, by plaintiff, on the plaintiff's case in chief, shall be reserved to the time of trial in this cause.

FOUMY SAISHO

of Tokyo, Japan, employed by the "Readers Digest," Japanese Branch, of lawful age, being by me duly sworn, deposes and says:

Direct Examination

By Mr. Theodore Tamba:

Q. State your full name, please?

A. Foumy Saisho.

Q. Miss Saisho, where were you born?

A. Japan.

Q. You are a Japanese National?

A. Yes.

Q. You have been in the United States, have you not?

A. Yes.

Q. When were you in the United States.

(Deposition of Foumy Saisho.)

A. From 1930 to 1933.

Q. You were attending the University of Michigan?

A. Yes.

Q. What is your present business or occupation?

A. I am with the Editorial Department of the Readers Digest, Japan Branch.

Q. Were you ever connected with Radio Tokyo?

A. Yes.

Q. For how long a period of time?

A. From August, 1935, to 1945, September, I think.

Q. What work did you do at Radio Tokyo?

A. I was chief translator.

Q. What did you translate, Miss Saisho?

A. Japanese commentaries. Before the war I used to translate cultural subjects and news from Japanese to English.

Q. During the war what did you do?

A. I was in the Lecture Department translating Japanese into English.

Q. Do you know Iva Toguri, also known as Iva D'Aquino?

A. Yes.

Q. When did you quit Radio Tokyo?

A. When?

Q. Yes.

A. Around 1943.

Q. How long did your acquaintanceship continue?

A. Until around the end of the war. Since then I have not seen her.

(Deposition of Foumy Saisho.)

Q. Did you ever work on any of her script?

A. No, I have not.

Q. What did Miss Toguri do at the radio station?

A. At first she was with the business department. Later on she became an announcer. For Major Cousens' program, the "Zero Hour."

Q. Do you know who prepared her script?

A. Major Cousens.

Q. Who coached her? A. Major Cousens.

Q. What kind of script did she read?

A. She read introductions to music. [3*]

Q. What kind of music was that?

A. Usually American jazz.

Q. Did Miss Toguri ever broadcast the loss of ships that you know of? A. No.

Q. Who did broadcast that type of news?

A. That would be broadcast by the news announcer.

Q. Do you know who was on the Zero Hour program besides Miss Toguri and Major Cousens?

A. Ken Oki, Ken Ishii, Miss Hayakawa and Moriyama, and I think a person called Ozaki.

Q. Were any women on that program besides Miss Toguri? A. Not regularly.

Q. Did any women take part on that program at any time? A. Yes.

Q. Who were they?

* Page numbering appearing at bottom of page of original Reporter's Transcript.

(Deposition of Foumy Saisho.)

A. Ruth Hayakawa, Mary Ishii, and the present Mrs. Oki.

Q. What name did she use in broadcasting?

A. "Annie," I think.

Q. Who gave her that name?

A. To the best of my knowledge, Major Cousens.

Q. Did you ever hear the name "Tokyo Rose" at the radio station? A. No.

Q. Did you ever hear anybody mention the name "Tokyo Rose" in conversation with you?

A. There was mention of "Tokyo Rose" toward the end of the war.

Q. Did you ever have a conversation with Ken Oki about Tokyo Rose? A. Yes.

Q. What was that conversation?

A. I asked him if Tokyo Rose indicated any particular person. He said that it did not represent any particular person, but it was used in broadcasting to the American soldiers. [4]

Q. Did you ever have a conversation with Mr. Oki to the effect that he thought he was entitled to one-half of the royalties for the use of "Tokyo Rose"? A. Yes.

Q. Where did that conversation occur?

A. Almost immediately after the surrender, early part of September.

Q. Where? A. Radio Tokyo.

Q. Did you ever have a conversation with Ken Oki in which he said "Iva can't do this to us"? A. Yes.

(Deposition of Foumy Saisho.)

Q. Was that in reference to the use of the name "Tokyo Rose"? A. Yes.

Q. Did you ever hear or know of Mrs. D'Aquino broadcasting about men ineligible for the American army fraternizing with women who had been left at home? A. I don't recall that.

Q. Did you ever know of Mrs. D'Aquino broadcasting anything other than what was on her script?

A. No.

Q. Were there any other women at Radio Tokyo besides those you mentioned and Mrs. D'Aquino who broadcast news and music? A. Yes.

Q. Who were they?

A. Suyama, June, I think that was all.

Q. Kathleen Fujiwara, do you know her?

A. Yes.

Q. Did she broadcast news and announce music?

A. She announced music, I think.

Q. Are you familiar with the German Hour?

A. I heard a voice once. [5]

Q. Was that a woman's voice? A. Yes.

Q. What did she broadcast?

A. News, I think. I didn't pay much attention to it, but it was in English.

Q. What kind of a broadcasting voice did Miss Toguri have?

A. She had a rather masculine sort of voice, low and throaty.

Q. What kind of music did she introduce?

A. Chiefly, American jazz, I think.

(Deposition of Foumy Saisho.)

Q. Do know if the Japanese Government had other radio stations besides Radio Tokyo?

A. Yes.

Q. Where? A. In the South.

Q. Name some of the places?

A. Formosa, Batavia, and the Philippines.

Q. Have you been present at conferences at Radio Tokyo where those stations were discussed?

A. Yes.

Q. Was Major Tsuneishi present at the time?

A. Yes.

Q. Did you learn that Mrs. D'Aquino became married during the war?

A. No, I did not know that.

Q. Have you learned since? A. Yes.

Q. Did Mrs. D'Aquino ever remain around the station after working hours?

A. I don't believe so.

Q. Did you ever have conversations with Mrs. D'Aquino about the war.

A. Yes, occasionally. [6]

Q. In particular, on one occasion when she stated, "This is an awful country"? A. Yes.

Q. Were her attitudes and expressions pro-American or pro-Japanese?

A. Pro-American.

Mr. DeWolfe: Just a minute, Mr. Tamba. I object to that as calling for a conclusion and being too speculative and conjectural.

The Court: Submitted?

Mr. Collins: Yes.

(Deposition of Foumy Saisho.)

The Court: Objection sustained.

(A. Pro-American.)

Q. Did you know what the Kempei-tai was during the war? A. Yes.

Q. What was it?

A. Military Police; it was greatly feared by the people.

Q. Do you know of any Kempei-tai agents being present at Radio Tokyo while you were there?

A. Yes.

Q. Where were those Kempei-tai?

A. They mixed with people and came to investigate each worker—what they were doing.

Q. Do you recall a Kempei-tai agent who used to sit near to you? A. Yes, I do.

Q. Was he there continually or constantly watching you?

A. Not constantly. He would go away once in a while. Almost every day he was there.

Q. Did he ever ask you about other people in the station and what they were doing?

A. Yes.

Q. Do you know who prepared the news items on the Zero Hour?

A. I think it was by Ince and he broadcast it himself.

Q. Do you know whether Miss Toguri or Mrs. D'Aquino ever wrote any? A. I don't know.

Q. Did she ever make a statement to you that it was impossible for Japan to win the war?

(Deposition of Foumy Saisho.)

A. I don't quite recall, but something to that effect. [7]

Q. Did she ever make the statement to you that she was working for the prisoners of war for the purpose of aiding them and nothing else?

A. I don't recall that statement.

Q. Did you know that Mrs. D'Aquino had access to allied news reports and knew how the war was progressing?

A. Well, all Zero Hour people had, so naturally she may have.

Q. Did Mrs. D'Aquino ever tell you that she had information on short wave broadcast?

A. No.

Q. Did she ever tell you that she hated the Japanese militarists? A. Yes.

Q. Did you ever know Mr. Ken Oki?

A. Yes.

Q. Do you know his reputation for truth, honesty and integrity in this community?

Mr. DeWolfe: I object to that as incompetent, irrelevant and immaterial, no proper foundation being laid and not a proper impeachment question.

The Court: Objection sustained.

(A. Not good at all.)

Q. Do you know Ken Ishii? A. Yes.

Q. Do you know his reputation for truth, honesty and integrity?

Mr. DeWolfe: I object to that as being incom-

(Deposition of Foumy Saisho.)

petent, irrelevant and immaterial, not proper impeachment, no foundation laid.

The Court: Objection sustained.

(A. Not good at all.)

Q. Do you know George Nakamoto?

A. Yes.

Q. What is his reputation for truth, honesty and integrity?

Mr. DeWolfe: Objected to as being incompetent, irrelevant and immaterial, not proper impeachment, no proper foundation laid.

The Court: Objection sustained.

(A. It wasn't particularly too good.)

A. I think that is all.

Cross-Examination

By Mr. Story:

Q. Miss Saisho, you have testified that Major Cousens prepared the script which Miss Toguri used on the Zero Hour program? A. Yes.

Q. Do you know of your own knowledge that he prepared these scripts? A. Yes, I do. [8]

Q. Did Major Cousens remain at Radio Tokyo until the end of the war? A. No.

Q. When did he leave the radio station?

A. About June, I believe, 1944.

Q. Did Major Cousens return to the radio station after that time?

A. I heard that he did, but I never saw him.

Q. From June, 1944, until the end of the war

(Deposition of Foumy Saisho.)

you never saw Major Cousens at the radio station?

A. No.

Q. Who prepared Miss Toguri's scripts after Major Cousens left the radio station?

A. I don't know.

Q. Miss Saisho, how many times were you actually physically present at the radio station when the Zero Hour program was broadcast?

A. I believe only once.

Q. One time? A. Yes.

Q. Of your own knowledge do you know of any instances where Mrs. D'Aquino was questioned by the Kempei-tai? A. No.

Q. Was Mrs. D'Aquino forced in any way to broadcast for the Radio Tokyo?

A. Not to my knowledge.

Q. Did Miss Toguri ever indicate to you that she was proud of her success as an announcer on the Zero Hour program? A. Yes.

Q. Was Miss Toguri a conscientious hard worker at the radio station? A. Yes. [9]

Q. Where was the Zero Hour beamed on the short wave?

A. Mainly to the Pacific Islands and to Australia, I am not sure about that.

Q. Was the Zero Hour program intended for the American soldiers in the Southwest Pacific Islands? A. Yes.

Q. After Major Cousens became ill and left the radio station, did Miss Toguri ever tell you that

(Deposition of Foumy Saisho.)

the scripts which were being prepared for her were terrible and not worthy of being broadcast?

A. That is right; she did.

Q. Did Miss Toguri ever tell you that the Zero Hour program was the best program broadcast at Radio Tokyo?

A. I have a vague recollection of it, but not the exact words, but I have a vague recollection that she said something like that.

Q. Did Miss Toguri consider herself the most successful announcer at Radio Tokyo?

A. I believe so.

Q. Was Miss Toguri treated in the same manner as other Japanese Nationals?

A. By Radio Tokyo?

Q. By Radio Tokyo.

A. I am not sure; I don't know. In point of remuneration she was treated in the same Japanese way.

Q. Do you mean by that that she received the same pay as the other persons employed there?

A. Yes, the same rate.

Q. Was Miss Toguri required to work as many hours at the Radio Station as other personnel who received the same salary as she?

A. I don't believe so. [10]

Q. Approximately how long did Miss Toguri remain at the broadcasting station each day?

A. Less than five hours; actually she only came for her broadcast.

(Deposition of Foumy Saisho.)

Q. How many hours were you required to be at the radio station?

A. Minimum of eight hours. But, of course, she made it up. It was very easy to make eight hours when you are actually working less than that.

Q. My question was, Miss Saisho, how many hours each day was Miss Toguri required to be physically present at the radio station?

Mr. Collins: I submit, if Your Honor please, that is calling for the opinion and conclusion of the witness, no foundation is laid.

The Court: Submitted?

Mr. DeWolfe: I think it is a proper question.

(Question read.)

The Court: You may answer.

A. The same as the rest of the staff; that is, eight hours.

Q. Miss Toguri was required to put in eight hours each day at the radio station?

A. I am not sure, of course, but that is my belief.

Q. When did Miss Toguri usually arrive at the radio station?

A. Of course, I was not always watching her arrive, but I would see her usually in the afternoon.

Q. What time did you usually arrive at work each day? A. Did I?

Q. Yes.

(Deposition of Foumy Saisho.)

A. Before noon, anyway, between ten and eleven and stayed until seven.

Q. Did Miss Toguri arrive there in the morning between 10 and 11? A. No; very rarely.

Q. Then you are testifying that Miss Toguri was required to spend eight hours a day at the radio station?

A. That is the requirement for every staff member, but I am not sure whether she was a staff employee or just attached to it. I don't know the office arrangement in her personal case.

Q. What was your salary each month?

A. I have forgotten. It was about 120 yen and went up to 150 yen. [11]

Q. What was Miss Toguri's salary?

A. Of course, I don't know, but I imagine it was about the same.

Redirect Examination

By Mr. Tamba:

Q. Miss Saisho, do you know if Miss Toguri was absent from the radio station for any period of time? A. Yes.

Q. How often was she absent?

A. She was quite often absent. She was absent continually toward the end of the war.

Q. That is all.

Recross-Examination

By Mr. Story:

Q. You say she was absent continuously toward

(Deposition of Foumy Saisho.)

the end of the war. When did this start, how long before the end of the war?

A. As soon as Miss Ishii took over, that was, I don't recall the exact date, but the fall of 1944.

Q. You have testified that Miss Toguri was continuously absent from the summer of 1944, or do you mean the summer of 1945?

A. Autumn or winter of 1944. Still I am not prepared to say that she was continuously absent.

Q. But you worked at the radio station. Are you in a position to know when Miss Toguri was at the radio station and when she was not there?

A. No, there was no way of knowing exactly.

Q. Then so far as you know she could have been there all of the time and you would not have known about it?

A. Theoretically so, but it can't happen, because the people who came I would see.

Q. You have testified that you were only physically present in the radio studio on one occasion during the Zero Hour program?

A. Yes.

Q. That is all.

/s/ FOUMY SAISHO. [12]

Japan,

City of Tokyo,

American Consular Service—ss.

I do solemnly swear that I will truly and impartially take down in notes and faithfully tran-

scribe the testimony of Foumy Saisho, a witness now to be examined. So help me God.

/s/ IRENE CULLINGTON.

Subscribed and sworn to before me this twenty-first day of April, A.D. 1949.

/s/ THOMAS W. AINSWORTH,

Vice Consul of the

United States of America.

[American Consular Service Seal.]

Service No. 598a; Tariff No. 38, No fee prescribed.

Japan,

City of Tokyo,

American Consular Service—ss.

CERTIFICATE

I, Thomas W. Ainsworth, Vice Consul of the United States of America in and for Tokyo, Japan, duly commissioned and qualified, acting under the authority of a certain stipulation for taking oral designations abroad, and upon order of the United States District Court, made and entered March 22, 1949, in the Matter of United States of America, Plaintiff, vs. Iva Ikuko Toguri D'Aquino, Defendant, pending in the Southern Division of the United States District Court, for the Northern District of California, and at issue between United States of America vs. Iva Ikuko Toguri D'Aquino, do hereby certify that in pursuance of the aforesaid stipulation and court order and at the request of Theodore Tamba, counsel for the defendant Iva Ikuko

Toguri D'Aquino I examined Foumy Saisho, at my office in Room 335, Mitsui Main Bank Building, Tokyo, Japan, on the twenty-first day of April, A.D. 1949, and that the said witness being to me personally known and known to me to be the same person named and described in the interrogatories, being by me first sworn to testify the truth, the whole truth, and nothing but the truth in answer to the several interrogatories and cross-interrogatories in the cause in which the aforesaid stipulation, court order, and request for deposition issued, her evidence was taken down and transcribed under my direction by Irene Cullington, a stenographer who was by me first duly sworn truly and impartially to take down in notes and faithfully transcribe the testimony of the said witness Foumy Saisho, and after having been read over and corrected by her, was subscribed by her in my presence; and I further certify that I am not counsel or kin to any of the parties to this cause or in any manner interested in the result thereof.

In witness whereof, I have hereunto set my hand and seal of office at Tokyo, Japan, this fifth day of May, A.D. 1949.

/s/ THOMAS W. AINSWORTH,
Vice Consul of the
United States of America.

[American Consular Service Seal.]

Service No. 808; Tariff No. 38; No fee prescribed.

[Endorsed]: Filed Aug. 24, 1949.

In the Southern Division of the United States
District Court for the Northern District of
California

No. 31712 R

UNITED STATES OF AMERICA,

Plaintiff,

vs.

IVA IKUKO TOGURI D'AQUINO,

Defendant.

DEPOSITION OF MASAACKI YANAGI

Deposition of Masaaki Yanagi, taken before me, Thomas W. Ainsworth, Vice Consul of the United States of America, in Mitsui Main Bank Building, Room 335, in Tokyo, Japan, under the authority of a certain stipulation for taking oral designations abroad, and upon order of the United States District Court, made and entered March 22, 1949, in the Matter of the United States of America vs. Iva Ikuko Toguri D'Aquino, pending in the Southern Division of the United States District Court, for the Northern District of California, and at issue between the United States of America vs. Iva Ikuko Toguri D'Aquino.

The plaintiff appearing by Frank J. Hennessy, United States District Attorney; Thomas DeWolfe, Special Assistant to the Attorney General, and Noel Story, Special Assistant to the Attorney General, and the defendant, appearing by Wayne N. Collins and Theodore Tamba.

The said interrogations and answers to the witness thereto were taken stenographically by Irene Cullington and were then transcribed by her under my direction, and the said transcription being thereafter read over correctly to said witness by me and then signed by said witness in my presence.

It is Stipulated that all objections of each of the parties hereto, including the objections to the form of the questions propounded to the witness and to the relevancy, materiality and competency thereof, and the defendant's objections to the use of the deposition, or any part of the deposition, by plaintiff, on the plaintiff's case in chief, shall be reserved to the time of trial in this cause.

MASAAKI YANAGI

of Tokyo, of lawful age, being by me duly sworn, deposes and says:

Direct Examination

By Mr. Tamba:

Q. State your name in full.

A. Masaaki Yanagi.

Q. What is your present address?

A. 223 Suwa Machi Sinjuku-Ku, Tokyo.

Q. Where were you born?

A. In San Francisco, California.

Q. When? A. 11 October, 1918.

Q. When did you come to Japan?

A. In April, 1933.

Q. Have you had occasion to return to the United States since 1933?

(Deposition of Masaaki Yanagi.)

A. No, I never have.

Q. Were you ever in the Japanese Army?

A. Yes, from December, 1938, to May, 1942.

Q. Have you participated in a Japanese election?

A. Yes, I have. [2*]

Q. You are now a Japanese national and citizen, is that correct?

A. Yes.

Q. Were you ever connected with Radio Tokyo?

A. Yes, from November, 1943, to September, 1945.

Q. What were your duties at Radio Tokyo?

A. I was classified as a clerk and my duties were as English announcer.

Q. What did you broadcast?

A. News and commentaries and sometimes introduced music.

Q. Who prepared your scripts for broadcast?

A. They were prepared by the English writing staff and they translated the news which came from the Japanese script section.

Q. Are you married?

A. Yes, I am.

Q. What does your family consist of?

A. My wife and one son.

Q. What were your hours of employment at Radio Tokyo?

A. The hours varied.

Q. Do you know a person named Iva Toguri, also known as Iva D'Aquino?

A. Yes.

Q. When and where did you meet that person?

A. When I entered Radio Tokyo, she was work-

* Page numbering appearing at bottom of page of original Reporter's Transcript.

(Deposition of Masaaki Yanagi.)

ing there as an announcer on the Zero Hour staff.

Q. What was she announcing on the Zero Hour?

A. She opened this program of the Zero Hour and also introduced music.

Q. What kind of music did she introduce?

A. It was jazz music.

Q. Did she read from any script in her announcing of musical records? [3]

A. Yes, she had a script in her hands.

Q. You have seen her broadcast?

A. Yes, I have.

Q. You have heard her broadcast?

A. Yes, I have.

Q. Have you ever noticed her in and around the radio station, coming and going from work, associating with people there?

A. No, I have not.

Q. May I put it this way. She was not particularly friendly with you, was she? A. No.

Q. Was she particularly friendly with Japanese people around the station? A. No.

Q. Was she particularly friendly with the prisoners, do you know? A. I don't know.

Q. Can you describe what kind of an announcing voice that Miss Toguri had?

A. One comment around the radio station when "Tokyo Rose" came out was that Tokyo Rose had a sweet voice, but I did not think she had a sweet voice.

Q. What kind of voice did she have?

(Deposition of Masaaki Yanagi.)

A. When I met her in the halls and said "hello" and when she answered, her voice sounded more masculine to me.

Q. How did her voice sound over the radio; did it have a musical sound?

A. Compared to the other girls' voices, her voice sounded masculine.

Q. Were there other women announcers around the radio station? A. Yes.

Q. Who were they?

A. They were Miss Suyama, Miss Hayakawa, Miss Murooka, and [4] Miss Mary Ishii, and for a short time, Miss Furuya, or the present Mrs. Oki.

Q. Was there a girl named Matsunaga?

A. Yes, there was a girl by that name, but she was not on the regular Radio Tokyo staff, but was on the German Hour.

Q. Was there a girl there by the name of Furuya? A. Yes. She was an announcer.

Q. What did Miss Suyama broadcast?

A. She broadcast news commentaries, introduced music and she had the children's hour.

Q. What did Miss Hayakawa do?

A. She did the same, except for the children's hour.

Q. What did Mrs. D'Aquino do?

A. She was on the Zero Hour.

Q. What did she broadcast?

A. She opened the program and introduced music.

(Deposition of Masaaki Yanagi.)

Q. Is that all she did?

A. Yes, that is all I remember.

Q. What did Miss Murooka do?

A. She was there for only one year and she was announcing news and commentaries and also introducing music.

Q. What did Miss Furuya do?

A. She was helping Mrs. D'Aquino on the Zero Hour. I recall that she was there for a short period.

Q. What did Mary Ishii do?

A. Toward the end of the war, Miss Ishii was helping Miss Toguri on the Zero Hour.

Q. What did Miss Furuya do?

A. She was announcing news commentaries and introducing music and also on the "Women's Hour."

Q. Do you know Mr. Ken Oki? A. Yes.

Q. What did he do?

A. He was on the staff of the Zero Hour.

Q. Do you know if he ever wrote script or broadcast news or commentaries?

A. While I was there I never saw him broadcasting but I heard he had broadcasted before I entered Radio Tokyo.

Q. Do you know if he wrote script?

A. I have seen him collect news and also type-writing, so I presume he was preparing script.

Q. Have you ever seen him in charge of prisoners of war? A. No, I have not.

Q. Do you know Nakamoto?

(Deposition of Masaaki Yanagi.)

A. Yes, I do.

Q. What did he do?

A. He was section chief on the "Zero Hour."

Q. Do you know whether or not he wrote script?

A. I saw him typing, but I do not know whether he was preparing script or not.

Q. Do you know Major Cousens?

A. Yes, I do.

Q. Who was he?

A. He was a prisoner of war at Radio Tokyo.

Q. What did he do at Radio Tokyo?

A. He was training the English announcers.

Q. Did you ever see him train any English announcer? A. No, I have not.

Q. Do you know a man named Ken Ishii?

A. Yes.

Q. Where did you meet him?

A. I entered Radio Tokyo the same time that he did.

Q. Was he at Radio Tokyo continuously from the time you entered until the end of the war? [6]

A. No.

Q. Where was he?

A. I think he was called to the Japanese Army; I don't know the exact date, but I think for a period of about one year.

Q. Do you know Captain Ince? A. Yes.

Q. Who was he?

A. He was also a prisoner of war.

Q. What did he do at Radio Tokyo?

(Deposition of Masaaki Yanagi.)

A. I don't know exactly.

Q. What did Ishii do?

A. He was an English announcer, also, and he broadcast commentaries and introduced music.

Q. Do you know what the Kempei-tai organization is? A. Yes.

Q. Did they wear uniforms in and around Radio Tokyo?

A. I heard they were there, but I never saw them personally.

Q. They never bother you, did they?

A. No.

Q. For what reason?

Mr. De Wolfe: I object to that as incompetent, calling for the conclusion, hearsay.

The Court: What reason they did not bother her?

Mr. Collins: Yes.

The Court: Objection sustained.

(A. I was also in the Japanese Army and I had good knowledge of Japanese and I think that was the main reason why I wasn't bothered by the Kempei-tai.)

Q. Do you know of an occasion when the Kempei-tai arrested certain people who were connected with Radio Tokyo? A. Yes, I do.

Q. Who were they?

A. Bucky Harris; another Mr. Miyata and Miss Hayakawa. I don't know whether she was arrested or not, but she was being looked for.

(Deposition of Masaaki Yanagi.)

Q. As a matter of fact, you forewarned her, is that correct? [7]

A. Yes; the Section Chief warned her it was advisable to leave for the country because the Kempei-tai were looking for her, and I also warned her that it was advisable for her to leave for the country.

Q. Why was Miyata arrested by the Kempei-tai, if you know?

A. Mr. Miyata was called by the Kempei-tai because he had a New Year's party at his home and at this party some of the persons danced there.

Q. What kind of dancing was that?

A. It was American style dancing.

Q. Incidentally were the people in Japan during the war permitted to speak English on the street?

A. I don't know of any law prohibiting it, but I have knowledge of occasions where people were called by the Kempei-tai or questioned by them because they spoke English on the street or trains.

Q. Was the American game of baseball permitted in Japan during the war?

A. No, that was also stopped by the Japanese Government.

Q. Do you know whether or not the Nisei had a hard time in Japan during the war?

Mr. De Wolfe: Just a moment, Mr. Tamba. Object to that as calling for a conclusion, too speculative, conjectural, incompetent.

(Deposition of Masaaki Yanagi.)

Mr. Collins: I think that this matter goes to one of the very issues involved in this case.

Mr. De Wolfe: What is a hard time, sir?

Mr. Collins: Well, following the next question it is directly related to that. Following that is the answer, as to whether they did or did not have a hard time, I mean, we have no objection to that being stricken out.

The Court: Let it go out.

(A. Yes, they did have a hard time.)

Q. In what way. Will you describe some of the difficulties?

Mr. De Wolfe: Object to that as incompetent, calling for a conclusion and——

Mr. Collins: Well——

Mr. De Wolfe: And I think the answer itself discloses at least in part that it is based on hearsay and conclusions, speculative; conjectural.

Mr. Collins: Well, it would be a matter within the personal knowledge of the witness.

The Court: Read the question and answer, and I will instruct the jury if it should not go in.

Mr. Collins: The question was, "Do you know whether or not the Nisei had a hard time in Japan during the war?" "Answer. Yes, they did have a hard time," and then the question: "In what way? Will you describe some of the difficulties?" and answer, "The main reason was, they ordered them to be naturalized as Japanese and that was because they wanted to call them for the army, and

(Deposition of Masaaki Yanagi.)

there were cases where some of the men after they became Japanese citizens were called to the army."

Mr. De Wolfe: Move that be stricken on the ground it is hearsay and calls for a conclusion; speculative and conjectural.

Mr. Collins: It is a matter within the personal knowledge of the witness as to the existing conditions.

Mr. De Wolfe: It does not say it was; some of it must have come from hearsay, what somebody else thought, the reason for something else.

The Court: The Court is prepared to rule now. The objection will be sustained; let it go out and let the jury disregard it.

(A. The main reason was that they wanted them to be naturalized as Japanese and that was because they wanted to call them for the army and there were cases where some of the men after they became Japanese citizens were called to the army.)

Q. Were the Nisei compelled to register?

A. They were requested to register.

Q. Do you know why Bucky Harris was apprehended by the Kempei-tai?

A. I don't know exactly, but I heard talk about it. [8]

Cross-Examination

By Mr. Story:

Q. How many women regularly participated in the Zero Hour?

A. Regularly just Miss Toguri.

(Deposition of Masaaki Yanagi.)

Q. The other people you mentioned as being on the Zero Hour program were substituting for Miss Toguri?

A. Yes. Mary Ishii and Miss Furuya were with Miss Toguri for a short period of time. They were not regularly there, but they were there at the same time.

Q. What were they doing there while Miss Toguri was there? A. I don't exactly know.

Q. They weren't participating in the program?

A. No, I don't think so.

Q. How many times did you actually observe the Zero Hour program when it was being broadcast in the studio?

A. Three or four times and that was in the monitor's room.

Q. You mention this party where they were dancing on New Year's Eve and as a result one of the persons there was arrested by the Kempei-tai; is that correct?

A. It was not on New Year's Eve, but it was at New Year's time, and it was not during the party but a few days later that he was called by the Kempei-tai.

Q. Was Miss Toguri at this party?

A. No, she wasn't.

Q. What name did Miss Toguri use when she was broadcasting on the Zero Hour program?

A. "Orphan Ann."

Q. Did Miss Toguri ever use the name "Ann"?

(Deposition of Masaaki Yanagi.)

to your knowledge in addition to "Orphan Ann"?

A. I only remember "Orphan Ann."

Q. In these broadcasts when you observed Miss Toguri broadcast, did you ever hear her refer to the American soldiers as "Orphans of the Pacific"?

Mr. Collins: I submit, if Your Honor please, that is calling for the opinion and conclusion of the witness. The testimony was that she did not observe the broadcast. The testimony of the witness was that she did not observe any broadcasts.

The Court: She was there.

Mr. Collins: No foundation has been laid. She had——

The Court: The testimony, as I followed it——

Mr. De Wolfe: Right up above, sir.

The Court: She was in the monitor's room.

Mr. De Wolfe: Yes. Right above, "How many times did you actually observe the Zero Hour program when it was being broadcast in the studio?" "Answer: Three or four times and that was in the monitor's room.

Mr. Collins: I may be in error, the monitor's room might be in the adjoining room. I withdraw my objection.

The Court: Proceed, gentlemen. [9]

A. Yes.

Q. Was it generally known at the radio station that Miss Toguri's part in the Zero Hour program

(Deposition of Masaaki Yanagi.)

was for the purpose of attracting listeners among the soldiers in the Southwest Pacific?

A. Yes, I think the reason they had a girl announcer there was to attract attention of the listeners.

Mr. Tamba: It was also true that the purpose of having other girl announcers was to attract attention, is that correct?

A. Yes.

/s/ MASA AKI YANAGI. [10]

Japan,
City of Tokyo,
American Consular Service—ss.

I do solemnly swear that I will truly and impartially take down in notes and faithfully transcribe the testimony of Masaaki Yanagi, a witness now to be examined. So help me God.

/s/ IRENE CULLINGTON.

Subscribed and sworn to before me this twenty-first day of April, A.D. 1949.

/s/ THOMAS W. AINSWORTH,

Vice Consul of the

United States of America.

[American Consular Service Seal.]

Service No. 599a; Tariff No. 38; No fee prescribed.

Japan,

City of Tokyo,

American Consular Service—ss.

CERTIFICATE

I, Thomas W. Ainsworth, Vice Consul of the United States of America in and for Tokyo, Japan, duly commissioned and qualified, acting under the authority of a certain stipulation for taking oral designations abroad, and upon order of the United States District Court, made and entered March 22, 1949, in the Matter of United States of America, Plaintiff, vs. Iva Ikuko Toguri D'Aquino, Defendant, pending in the Southern Division of the United States District Court, for the Northern District of California, and at issue between United States of America vs. Iva Ikuko Toguri D'Aquino, do hereby certify that in pursuance of the aforesaid stipulation and court order and at the request of Theodore Tamba, counsel for the defendant Iva Ikuko Toguri D'Aquino, I examined Masaaki Yanagi, at my office in Room 335, Mitsui Main Bank Building, Tokyo, Japan, on the twenty-first day of April, A.D. 1949, and that the said witness being to me personally known and known to me to be the same person named and described in the interrogatories, being by me first sworn to testify the truth, the whole truth, and nothing but the truth in answer to the several interrogatories and cross-interrogatories in the cause in which the aforesaid stipulation, court order, and request for deposition issued, his evidence was taken down and transcribed

under my direction by Irene Cullington, a stenographer, who was by me first duly sworn truly and impartially to take down in notes and faithfully transcribe the testimony of the said witness Masaaki Yanagi, and after having been read over and corrected by him, was subscribed by him in my presence; and I further certify that I am not counsel or kin to any of the parties to this cause or in any manner interested in the result thereof.

In witness whereof, I have hereunto set my hand and seal of office at Tokyo, Japan, this fifth day of May, A.D. 1949.

/s/ THOMAS W. AINSWORTH,
Vice Consul of the
United States of America.

[American Consular Service Seal.]

Service No. 810; Tariff No. 38; No fee prescribed.

[Endorsed]: Filed Aug. 24, 1949.

In the Southern Division of the United States
District Court for the Northern District of
California

No. 31712 R

UNITED STATES OF AMERICA,
Plaintiff,

vs.

IVA IKUKO TOGURI D'AQUINO,
Defendant.

DEPOSITION OF GEORGE OZASA

Deposition of George Ozasa, taken before me, Thomas W. Ainsworth, Vice Consul of the United States of America, in Mitsui Main Bank Building, Room 335, in Tokyo, Japan, under the authority of a certain stipulation for taking oral designations abroad, and upon order of the United States District Court, made and entered March 22, 1949, in the Matter of the United States of America vs. Iva Ikuko Toguri D'Aquino, pending in the Southern Division of the United States District Court, for the Northern District of California, and at issue between the United States of America vs. Iva Ikuko Toguri D'Aquino.

The plaintiff appearing by Frank J. Hennessy, United States District Attorney; Thomas DeWolfe, Special Assistant to the Attorney General, and Noel Story, Special Assistant to the Attorney General, and the defendant, appearing by Wayne N. Collins and Theodore Tamba.

The said interrogatories and answers of the witness thereto were taken stenographically by Irene Cullington and were then transcribed by her under my direction, and the said transcription being thereafter read over correctly to said witness by me and then signed by said witness in my presence.

It is Stipulated that all objections of each of the parties hereto, including the objections to the form of the questions propounded to the witness and to the relevancy, materiality and competency thereof, and the defendant's objections to the use of the deposition, or any part of the deposition, by plaintiff, on the plaintiff's case in chief, shall be reserved to the time of trial in this cause.

GEORGE OZASA

of Tokyo, employed by Broadcasting Corporation of Japan, of lawful age, being by me duly sworn, deposes and says:

Direct Examination

By Mr. Tamba:

Q. What is your full name?

A. George Ozasa.

Q. Where do you reside?

A. Tokyo Ota Ku Magome Higashi 4-33.

Q. What is your present occupation or business?

A. I am now working for Broadcasting Corporation of Japan in the Planning Department, Music Section.

Q. Where were you born?

(Deposition of George Ozasa.)

A. Salt Lake City.

Q. When were you born?

A. June 23, 1919.

Q. Did you receive any formal education in the United States?

A. I had my primary and high school education in Salt Lake City and Los Angeles.

Q. Did you attend any university in the United States?

A. Yes, for year at University of Penn. [2*]

Q. When did you come to Japan?

A. I first came in 1934, after I graduated from High School.

Q. Did you return to the States after that?

A. Yes, in 1939.

Q. I assume after returning to the United States, you returned to Japan again?

A. Yes, in 1940.

Q. You are now a citizen and national of the empire of Japan? A. Yes.

Q. When and under what circumstances did you change your citizenship?

A. I changed my citizenship in the early part of 1942, because it was impossible at that time to secure any job and I had no choice but to become a Japanese citizen at that time if I wanted to earn my living in Japan. I entered the Overseas Department of Radio Tokyo in 1942.

Q. In other words, it was impossible for you

* Page numbering appearing at bottom of page of original Reporter's Transcript.

(Deposition of George Ozasa.)

to live here unless you became a Japanese National? A. Yes.

Q. Were the American citizens of Japanese ancestry having a difficult time in Japan during the war securing employment?

Mr. De Wolfe: I object to that as immaterial and too remote.

The Court: The objection is sustained.

Mr. Collins: I might direct Your Honor's attention to the fact that in connection with that objection, the answer relates directly to the defendant's procurement of employment at Radio Tokyo as one of the Nisei in Japan.

The Court: The Court has ruled. You may proceed.

(A. When the war broke out we were all more or less asked to concentrate in one place and those who had a special talent, such as writing, they were more or less assigned to various jobs and as I had taken up journalism at school, they asked me to work for Radio Tokyo. However, to work for Radio Tokyo one had to give up his American citizenship and become a Japanese subject.)

Q. Do you know what the organization called the Kempei-tai was?

A. Yes, it was sort of military police, but its job was much larger than that and they had practical supervision over all civilians and over the daily lives of people in Japan [3] during the war period.

(Deposition of George Ozasa.)

Q. Do you know of any Kempei-tai being around Radio Tokyo?

A. Yes, quite a few at all times at Radio Tokyo and another thing, there were many people who were assigned by the Kempei-tai to become part time employees of Radio Tokyo, but they were actually on the Kempei-tai payroll but in name they were employees of Radio Tokyo.

Q. Do you know a person by the name of Iva Toguri, also known as Iva D'Aquino?

A. Yes, she was a part time employee of Radio Tokyo and she used to announced for the program known as the "Zero Hour."

Q. Do you recall an occasion when the Zero Hour program was interrupted by a flash news bulletin announcing the fall of Saipan?

A. Yes.

Q. What happened after that flash news was announced?

A. The flash news came in about five minutes before the end of the broadcast and after that the record "Stars and Stripes" was played and because of that the Kempei-tai had us all up for questioning and we were questioned as to why that certain record was played at that time. Another thing, the Kempei-tai actually thought we had played the "Star Spangled Banner" after this news flash on the fall of Saipan, but we proved to the Kempei-tai that the record played was "Stars and Stripes" and not the "Star Spangled Banner" be-

(Deposition of George Ozasa.)

cause we did not have that record in the library at that time. This playing of the "Stars and Stripes" became quite a big problem and I was called by the Kempei-tai three or four times.

Q. Were you detained by the Kempei-tai for that?

A. I was called up on three different occasions and they asked me various questions as to why we had played such and such a record at that time and who was responsible, and at that [4] time Mr. Reyes and Miss Toguri was called before the Kempei-tai and questioned concerning this program.

Q. Who was in the radio broadcasting room when that record was played?

A. Mr. Reyes and Miss Toguri.

Q. Where were you?

A. In the control room.

Q. Was anyone else in the control room?

A. The engineer was.

Q. Was any other member of the cast of the Zero Hour present at that time?

A. No; on that day the Zero Hour was having a party and the only two people in the studio at that time were Reyes and Miss Toguri.

Q. No other member of the Zero Hour program was there? A. No.

Q. Were persons unconnected with the Zero Hour program ever allowed in the broadcasting room?

A. No, that was strictly prohibited.

(Deposition of George Ozasa.)

Q. You say, no one else was allowed?

A. No. Only employees directly connected with the Zero Hour program were allowed. I used to pinch hit for studio people.

Q. What kind of a program was the Zero Hour program, if you recall?

A. It was an hour program—sort of a variety type of program, which used to feature classical music, sweet jazz music and hot swing music with commentaries and news items sandwiched in between.

Q. Was that program one that could be enjoyed by anyone who did not have a good knowledge of English?

A. This program used to carry quite a bit of slang and was [5] a fast moving program and for an ordinary Japanese National or person who knew little English, it would have been impossible for that person to pick up and understand that program.

Q. Do you know whether or not Miss Toguri was particularly friendly with the Japanese people around Radio Tokyo?

A. She was employed in the capacity of part time employee at Radio Tokyo. She used to come in for Zero Hour and go out at the end of it and very few people knew her or had speaking acquaintance with her outside the people directly connected with the Zero Hour, and even people on the Zero Hour knew very little about her, because she used

(Deposition of George Ozasa.)

to come in for her broadcast and as soon as it was over, she would leave.

Q. Did you ever have occasion to notice her associating with prisoners of war?

A. She used to work directly with the Australian, Mr. Cousins, and Mr. Ince and Mr. Reyes, who were directly connected as script writers with the Zero Hour.

Q. Would it be a fair statement to say that she appeared to be very friendly to prisoners of war?

A. Yes, I would say more friendly than to Japanese Nationals.

Q. Who else was on the Zero Hour program besides Miss Toguri and Mr. Reyes.

A. Mr. Mitsushio, head of the Zero Hour Department, and Mr. Oki and Mr. Moriyama, and then there were Ken Ishii and Miss Ishii and Miss Furuya. They were the people outside of the two or three directly connected with the Zero Hour. The Zero Hour was an entire staff by itself composed of about ten to twelve people and they worked entirely apart from the rest of Radio Tokyo.

Q. How many women were on that hour? [6]

A. Altogether there were four women connected with this program. One, Miss Hayakawa, who was connected with the program during its initial stages, used to pinch hit for Iva Toguri when Iva was out in the early part of 1944.

Q. Do you know what became of the records of employment of Radio Tokyo?

(Deposition of George Ozasa.)

A. All records written and recorded of Radio Tokyo were destroyed at the termination of the war by orders of the Army Department.

Q. Do you know what became of the records of employment of Radio Tokyo?

A. They were burned or destroyed. We were specifically ordered to burn any records or scripts that we might have at home.

Q. Was a record made of the Zero Hour broadcast?

A. No record was ever made of the Zero Hour.

Q. Can you tell us when the severe bombing occurred in this area?

A. The bombing started in March, 1945.

Q. What happened to the Zero Hour at that time?

A. It used to go on but with a very reduced staff and Iva was very seldom present.

Q. Do you know whether or not she was absent from her employment during any period of time?

A. After the heavy bombing started she was absent for quite a while and in the early part of 1944 she was absent for quite a period of time and about two or three weeks before the war ended she had already quit Radio Tokyo. She was a part time employee and I do not think they have any definite record of her being employed as a member of Radio Tokyo, so whether or not they required a resignation, I am not sure. Regular members were not allowed to resign.

(Deposition of George Ozasa.)

Q. Was this program of Zero Hour censored?

A. Yes, it was censored by four different departments—the Army Department; the Navy Department; the Department of Communications; and the Board of Information.

Q. Will you tell us what Miss Toguri did?

A. She used to announce parts that had to do with swing music on the Zero Hour.

Q. Did she announce this by scripts?

A. Scripts that were prepared for her by Mr. Cousens or Mr. Ince.

Q. Do you know if Iva Toguri ever prepared any of her own scripts?

A. I personally have never seen her prepare her script. I have seen her many times go over script that Mr. Cousens wrote.

Q. Did any other women besides Miss Toguri broadcast introductions?

A. Miss Ishii and Miss Furuya. Miss Ishii used to broadcast the classic type of music and Miss Furuya broadcast sweet music.

Q. Is Miss Furuya now Mrs. Oki?

A. Yes.

Q. Do you remember the theme song of Zero Hour?

A. "Strike up the Band."

Q. Do you know a person by the name of Ruth Hayakawa?

A. She was a regular employee of Radio Tokyo. She was an announcer.

Q. Did she take part in the Zero Hour?

(Deposition of George Ozasa.)

A. In 1944 when Miss Toguri was out, Ruth used to pinch hit for her for several weeks.

Q. Do you know anything about a program called the "German Hour"?

A. Yes, it was a program edited and put on by the German Embassy, prepared for use by Japanese announcers.

Q. What hour of the day did that program go on? [8]

A. On the European network it went on at one time from 1:00 to 1:30.

Q. Was the time ever changed?

A. I believe at one time it was changed to six in the evening.

Q. Were any women on that program?

A. Yes, Miss Matsunaga.

Q. Will you describe her?

A. She was rather round faced and at times she wore pigtails and her appearance was very similar to Miss Toguri's. Her voice resembled Miss Toguri's in the way that she used to use quite a bit of American slang on the program and her voice registered on the air rather husky and corny, the way Miss Toguri's used to register. I would say much of her scripts resembled Zero Hour scripts very much. She used to use records which were brought to the station by the German Embassy, that is, the jazz records.

Q. Was the German Hour program broadcast in English? A. Yes.

(Deposition of George Ozasa.)

Q. Have you ever heard of a person by the name of "Brundage"?

A. Yes, he is a newspaper reporter, although I never met him personally, but I have heard his name.

Q. Mr. Ozasa, I invite your attention to a statement made by Mr. Brundage to certain parties, whom I do not wish to name at this time, in substance, as follows: "Miss Toguri took over the writing of her own script. Wallace Ince and the Australian had been doing them. They continued on the program as announcers, advisors, etc., but I announced and played the music and I did the propaganda job, too. Some of the propaganda was pretty tough. You can go all out and say it was pretty dirty. I only not made reference about what wives and sweethearts of American troops were doing at home while they were giving their blood and sweat in the mud, heat and rain, and I made flat statements about their alleged misconduct." I will ask you if that statement is true or false?

Mr. De Wolfe: Objected to as not proper impeachment. Brundage was not called by either party. It is incompetent, irrelevant and immaterial.

The Court: Objection sustained.

(A. I would call that statement false on two points. One point, her scripts were written by Mr. Cousens and Mr. Ince and she never wrote any of her scripts herself, and another point on that is that compared to some of the news items and comments that used to go over the radio at that time,

(Deposition of George Ozasa.)

the Zero Hour was kept pretty clean. The contents of the Zero Hour was kept very clean compared to some news items and commentaries that were used during that period.)

Q. Were any so-called dirty statements or propaganda made over the broadcast from Radio Tokyo?

Mr. De Wolfe: I object to that question as being too general and also involved in the same matter as the last question to which objection was sustained. It is not proper impeachment.

The Court: The objection will be overruled. He may answer.

A. In the matter of news items and commentaries, quite a few were, but the Zero Hour was aimed principally at the GI's and in order to stimulate interest in that program, the program was kept on a pretty clean level. That I can say because I went through many scripts myself and I seldom saw any statements that could be termed as dirty.

Q. Mr. Brundage also made another statement in which he said that Miss Toguri stated to him that she was the only woman to ever broadcast over the Zero Hour program. Is that statement true or false?

Mr. De Wolfe: I object to that as incompetent, irrelevant and immaterial and without foundation.

The Court: The objection will be sustained.

(A. That statement is false because, as I mentioned before, there were three other girls connected with the Zero Hour. Each girl had a definite part on the Zero Hour. I might add that each person

(Deposition of George Ozasa.)

on the Zero Hour program had a definite part; one person acted as master of ceremonies, usually Mr. Oki and Moriyama, and another person who just read news, usually Mr. Oki, and there was another person who read commentaries, usually Mr. Mitsushio. [10] At times they used to have short skits and each girl had a definite part. Miss Ishii played ten minutes classical music; Miss Furuya played ten minutes of sweet music and Miss Toguri played ten to fifteen minutes of swing music.)

Q. Did Miss Toguri use any name in announcing?

A. She often used the name of "Orphan Ann." This name was given to her by Mr. Cousens. When this program started they wanted to know what name to go by and Mr. Cousens thought that Ann was short for announcer and they took that name.

Q. Mr. Ozasa, you have talked to Mr. Tillman of the FBI about this case? A. Yes, I have.

Q. That was before you talked to me the other night and this morning, is that correct?

A. Yes.

Q. That is all.

Cross Examination

By Mr. Story:

Q. Mr. Ozasa, you have testified that you changed your citizenship from American to Japanese in 1942, is that correct?

A. After the war started.

(Deposition of George Ozasa.)

Q. Approximately when in 1942 did you change your citizenship? A. Early in 1942.

Q. What were you doing prior to the time you changed citizenship?

A. I was attending college in Japan—College of Foreign Languages.

Q. You stated that in order to work at Radio Tokyo one had to have Japanese citizenship, is that correct?

Mr. De Wolfe: I ask that this question and answer go out because the corresponding matter on direct examination went out. The next two questions should go out with the answers because they went out on direct examination.

The Court: Is there any objection?

Mr. Collins: Yes, there is objection to that, if Your Honor please, because the question is propounded here "You said that in order to work at Radio Tokyo one had to have Japanese citizenship?" It is still pertinent to the issue.

Mr. De Wolfe: The identical matter went out on direct examination.

Mr. Collins: I think that it is because of the method in which the question had been propounded.

Mr. De Wolfe: The testimony went out on direct examination.

The Court: You must get a record. I must rule.

Mr. De Wolfe: On page 3 of this deposition, lines 26 to 28, that identical point went out on our objection.

(Deposition of George Ozasa.)

Mr. Collins: That is the only place it was testified to on direct, and that is what prompted this cross-examination. The question is propounded, if Your Honor please, on the direct examination on page 3: "Were the American citizens of Japanese ancestry having a difficult time during the war securing employment?" You sustained an objection, but the present question is propounded on the cross-examination as follows: "You stated that in order to work at Radio Tokyo one had to have Japanese citizenship. Is that correct?"

Mr. De Wolfe: Yes, but his answer to the question which counsel propounded on direct examination, the last three lines of it, dealt with this subject, work at Radio Tokyo and American citizenship, but whether or not American citizenship was an obstacle to working at Radio Tokyo that question and answer were stricken, and therefore this cross-examination on that identical point is not proper.

The Court: You will have to proceed with question and answer and I will rule.

Mr. Tamba: Which one, Mr. De Wolfe?

Mr. De Wolfe: Page 11, line 26;

"Q. You state that in order to work at Radio Tokyo one had to have Japanese citizenship, is that correct?"

Mr. De Wolfe: I move that that be stricken. We object to it on the ground that the objection to the identical matter was sustained on direct examination.

The Court: Submitted?

(Deposition of George Ozasa.)

Mr. Collins: Yes, Your Honor.

The Court: Objection is sustained.

Mr. De Wolfe: The next question, "Is that statement true?" The same objection for the same reason.

The Court: Same ruling. The objection will be sustained.

(A. Yes.)

Q. Is that statement true? (A. Yes.)

Q. There were no foreign nationals working at Radio Tokyo? [11]

A. Not of Japanese blood.

Q. You are telling us that if you were of Japanese blood you could not work at Radio Tokyo without being a Japanese National?

A. Yes, as a full time employee. There were quite a few foreigners working for Radio Tokyo all employed as part time employees. There was a definite difference between full time and part time employees.

Q. Could a part time employee of Japanese blood but of other citizenship be employed at Radio Tokyo?

A. So far as I know, no. In the case of Miss Toguri, she was not employed by Radio Tokyo; she was forced by the Army Department to work for Radio Tokyo; they forced her upon Radio Tokyo.

Q. Are you testifying as to something you know of your own knowledge or as to something you have heard or presume?

(Deposition of George Ozasa.)

Mr. Tamba: You mean in reference to Miss Toguri?

Mr. Story: Yes.

Q. Mr. Ozasa, do you know the meaning of an oath? A. Yes.

Q. Do you know you are subject to punishment for not telling the truth? A. Yes.

Q. We only want you to testify as to what you know of your own knowledge; not what you have heard from someone else. Now, of your own knowledge, do you know that a part time employee of Radio Tokyo of Japanese blood had to be a Japanese citizen in order to work for the radio station?

A. Yes, I do.

Q. You personally know that each and every person of Japanese blood that worked, either part time or full time for Radio Tokyo was a Japanese National? [12]

A. Yes.

Q. Mr. Ozasa, you have testified that there were all kinds of Kempei-tai at Radio Tokyo, is that correct?

A. What I meant was that people who were not actually Kempei-tai but were employed by the Kempei-tai to give information on what was going on at Radio Tokyo.

Q. Is that what you testify to? A. Yes.

Q. Name some of these people who belonged to the Kempei-tai at the radio station.

A. Mr. Uno was connected with the Kempei-tai.

(Deposition of George Ozasa.)

Q. Do you know of your own knowledge that he was employed and paid by the Kempei-tai?

A. Yes, I do.

Q. Do you know the names of any other Kempei-tai at the radio station?

A. I can't give you definite names.

Q. Then you don't know anybody connected with the Kempei-tai but Mr. Uno, is that correct?

A. Yes. After the bombings started there were Kempei-tai who made periodical appearances at Radio Tokyo and I, myself, was checked several times by members of the Kempei-tai. I definitely cannot report the names of the fellows. That we were watched I definitely know, because my personal things in the place where I used to live during the war was searched several times.

Q. You have testified that after the fall of Saipan the "Stars and Stripes" was played on the Zero Hour?

A. Yes. The Zero Hour was an hour program and just before the end of the Zero Hour program the flash news on the fall of Saipan came in and the record that played was the "Fair of the Fairest" and it was turned over and the "Stars and Stripes" [13] played until the end of the program, which was at seven o'clock. That record "Stars and Stripes" which was played was on the other side of "Fair of the Fairest" and the Kempei-tai thought that we had played the "Star Spangled Banner," and I proved to them that we did not play

(Deposition of George Ozasa.)

the "Star Spangled Banner" because we did not have the record.

Q. Did Miss Toguri have anything to do with the playing of this record?

A. She was in the studio with Mr. Reyes.

Q. Tell us what was done.

A. Mr. Reyes was at the turn table and he turned it over and since she was in the studio with Mr. Reyes I do not see that she had a definite part in the thing.

Q. Who actually physically played the recording?

A. Mr. Reyes.

Q. You have testified that Miss Toguri was questioned by the Kempei-tai after this incident. Were you personally present when she was interviewed?

A. No.

Q. Then of your own knowledge you do *not whether* or not she was questioned by the Kempei-tai?

A. Everybody concerned with the program was questioned. We were all called in—one at a time.

Q. Were you present when she was questioned by the Kempei-tai?

A. No.

Q. You have testified that Miss Toguri was friendly with the prisoners of war at the radio station and not necessarily friendly with the Japanese Nationals, is that correct?

A. Yes.

Q. What were these prisoners of war doing at the radio station?

A. Mr. Cousens used to write commentaries and

(Deposition of George Ozasa.)

acted as coach for news writers and announcers and Mr. Ince acted in the same [14] capacity.

Q. Were these prisoners of war writing scripts for Radio Tokyo? A. Yes.

Q. Were some of these prisoners of war broadcasting propaganda for the Japanese radio?

A. They had this program, which was called *Hi no Maru Hour*, which was put on by the Army Department and it was a half hour broadcast every day.

Q. Were the prisoners of war broadcasting?

A. Yes.

Q. Mr. Ozasa, you have testified that Miss Toguri was away from the radio station in 1944?

A. In the early part of 1944.

Q. How long was she away from the radio station?

A. I cannot definitely say, but I would say about a month. That was when Ruth Hayakawa was pinch hitting for her.

Q. You have testified that Miss Toguri was away from the radio station in 1945, when was that?

A. Toward the end of the war — about three weeks before the end of the war and from then she did not come at all to the radio station and she was on and off quite frequently in 1945.

Q. Is that the only time she was away from the radio station in 1945 for an extended period of time?

A. As far as I know. I, myself, very seldom went to the Zero Hour rooms and there were times

(Deposition of George Ozasa.)

when I was busy with my own work and she may have been absent but it did not come to my knowledge.

Q. How many times a week was the Zero Hour broadcast? A. Every day of the week.

Q. Tell me approximately how many times you were actually at the Zero Hour and observed the broadcast of the Zero Hour. [15]

A. At the beginning of the Zero Hour program I was there practically every day; roughly, about 15 or 16 days when I saw the whole program.

Q. You have testified that four different women had participated in the Zero Hour broadcast. Were these persons substituting for Miss Toguri, or did they have a regular portion of the Zero Hour program daily?

A. Miss Hayakawa was substituting for Miss Toguri, but the other two had a regular part in the Zero Hour program.

Q. In other words, they appeared every day in the program? A. Yes.

Q. What were the names of these persons?

A. Miss Ishii and Miss Furuya.

Q. Mr. Ozasa, tell us of your own knowledge as to whom prepared the script for Miss Toguri?

Q. Of my own knowledge, I know that Mr. Cousens prepared the script.

Q. Have you actually seen Mr. Cousens prepare the script?

(Deposition of George Ozasa.)

A. Yes. I saw Miss Toguri and Mr. Cousens go over the scripts.

Q. Did Miss Toguri ever change the scripts?

A. I don't know that. I saw them go over the scripts together, and he would coach her on how to stress this point or that point, but what was actually in the script I never saw; I only heard it over the broadcast.

Q. When did Major Cousens leave the Radio Station? A. What do you mean?

Q. Did Cousens remain at the radio station until the end of the war?

A. The early part of August.

Q. You are positive that Major Cousens remained at the radio station and prepared scripts for Miss Toguri up until August, 1945? [16]

A. Toward the end of the war, as I said, Miss Toguri was not on the program any more in August.

Q. Give the date, approximately, when Miss Toguri quit participating in the Zero Hour program?

A. To my knowledge, about the middle of July.

Q. Major Cousens was still there at that time?

A. Yes; he was participating in the Zero Hour.

Q. He was writing Miss Toguri's scripts up until July, 1945? A. So far as I know, he was.

Q. What was the purpose of Miss Toguri's part on the Zero Hour program?

A. I would say that her part was to furnish entertainment.

(Deposition of George Ozasa.)

Q. Did you testify in your direct examination that it was to draw listeners among the soldiers?

A. Yes.

Q. You are telling us that Miss Toguri's part was to draw listeners? A. Yes.

Q. Was there any propaganda on the Zero Hour after Miss Toguri's part on the program?

Mr. Collins: I submit, if Your Honor please, that is calling for the opinion and conclusion of the witness; improper cross-examination, incompetent, irrelevant and immaterial.

Mr. DeWolfe: On direct examination my recollection is that there is testimony, I think in part over my objection, as to whether the program had anything further in it, or anything of a propaganda nature. Those were the very words that I remembered in the question propounded on direct examination.

Mr. Collins: My recollection is that it was stricken.

Mr. DeWolfe: No sir, my objection to that was overruled.

The Court: Read the question Mr. Reporter.

(Question read.)

The Court: It may be answered. Objection will be overruled.

A. You mean in her part?

Q. After her part was over, was there any propaganda following her part in the Zero Hour program?

(Deposition of George Ozasa.)

A. I am not sure whether she went on in the beginning or the end.

Q. Was there any propaganda at all broadcast on that Zero Hour program?

Mr. Collins: I submit, if Your Honor please, that is calling for the opinion and conclusion of the witness; it is improper cross-examination and it is incompetent, irrelevant and immaterial.

The Court: Read the question.

(Question read.)

The Court: Objection will be overruled; he may answer.

A. All news and commentaries read were propaganda.

Q. When you were present in the studio and observed Miss Toguri broadcast, did you ever hear her make a remark such as this: "Boneheads of the Pacific, don't you wish you were home by the fireside or home with an ice cold drink or walking or driving in the woods with your girl friend, [17] instead of being in the foxholes or jungles fighting mosquitoes"?

A. No, I did not. I heard her use the expression "Boneheads," but I never heard the other part.

Q. You never heard her mention, "Don't you wish you were home by the fireside"? A. No.

Q. Do you remember making a statement to Special Agent Tillman of the FBI?

A. I spoke with him, yes.

Q. Did you tell Mr. Tillman at the time you spoke to him that you heard Miss Toguri say, "Boneheads

(Deposition of George Ozasa.)

of the Pacific, don't you wish you were home by the fireside rather than fighting mosquitoes in the jungles"?

A. No, I never made that statement to him. I made the expression "Boneheads of the Pacific." I heard that several times on the air.

Q. When did you talk to Mr. Tillman?

A. In January—I just saw him once or twice.

Q. Do you recall telling Mr. Tillman that the purpose of the program was to make the American soldiers in the Southwest Pacific homesick?

Mr. Collins: I object to that on the ground that it is improper cross-examination; it is not proper impeachment; no foundation has been laid; and it is incompetent, irrelevant and immaterial.

The Court: Read the question.

(Question read.)

The Court: Objection will be overruled; he may answer.

A. Yes.

Q. Did Miss Toguri appear to be pleased with her success as an announcer on the Zero Hour program?

A. I didn't know Miss Toguri well enough to answer that question. I knew her by sight but I was not on speaking terms with her.

Q. Did you ever observe anything concerning Miss Toguri which indicated an unwillingness to participate in the radio broadcast?

(Deposition of George Ozasa.)

A. If you could call the fact that she was not on time for her broadcasts unwillingness to participate in the program. [18] When she was scheduled on the first part of the program and she was not on time, they would have to switch her part to the end.

Q. My question was, did you ever observe anything to indicate an unwillingness on her part to participate in this radio broadcast?

A. That is the only answer I could make. I did not know her very well, as I very seldom spoke to her.

Q. Do you recall telling Mr. Tillman that you never heard any comments that indicated that she was unwilling to participate in the radio broadcast?

Mr. Collins: I object to that on the grounds that it is calling for the opinion and conclusion of the witness, would be hearsay and is not proper impeachment, no foundation has been laid, and it is incompetent, irrelevant and immaterial.

The Court: The objection will be overruled.

Mr. Collins: And improper cross-examination.

A. No, I have never said anything like that. My only speaking acquaintance was to say "hello" or "good afternoon."

Q. I think that is all.

Re-direct Examination

By Mr. Tamba:

Q. Mr. Ozasa, do you know the name of the Kempei-tai who questioned you?

(Testimony of George Ozasa.)

A. No, I don't.

Q. How many different members of the Kempeitai questioned you?

A. As I recall there were several fellows around.

Q. Do you know the name of the Kempeitai who searched your home in your absence?

A. No. They never gave names.

Q. Regarding the actual playing of the records, did Miss Toguri ever put a record on the machine or was that done by someone else?

A. I don't know if she ever acted in that capacity of record playing.

Q. But you know that she introduced records?

A. Yes.

Q. Do you know whether or not Miss Toguri ever became a Japanese citizen? [19]

A. I don't know.

Q. Did you ever see prisoners of war slapped?

A. No.

Q. Do you recall Mr. Cousens being absent from the radio station on account of illness?

A. Yes. He was in the Juntendo Hospital. One of the hospitals right near the Apartments.

Q. How long was he in that hospital, if you know? A. I don't know.

Q. Can you give us an estimate?

A. Two or three weeks.

Q. Do you know what year that was?

A. No, I don't know—end of 1943 or early 1944; I am not sure.

(Testimony of George Ozasa.)

Q. Did you ever see Mr. Ince coach Miss Toguri?

A. I have seen him several times giving pointers on announcing. He used to be the coach for all the announcers.

Q. That is all.

Re-Cross-Examination

By Mr. Story:

Q. Do you know Mr. Philip D'Aquino?

A. He is Miss Toguri's husband. I recall seeing him several times around the radio station, but who he was I had no knowledge.

Q. Have you talked to Mr. D'Aquino since you talked to Mr. Tillman in January of this year?

A. The first time I met Mr. D'Aquino was after the war when I went to Mr. Tamba's office.

Q. Did you talk to Mr. D'Aquino?

A. Mr. Tamba was there and Mr. Nakamura and several others.

Q. Have you talked to Mr. D'Aquino alone?

A. No.

Q. At any time since you talked to Mr. Tillman?

A. No. [20]

Mr. Tamba: As a matter of fact, I introduced you to Mr. D'Aquino, isn't that a fact?

A. Yes.

Q. That is all. [21]

Japan,
City of Tokyo,
American Consular Service—ss.

CERTIFICATE

I, Thomas W. Ainsworth, Vice Consul of the United States of America in and for Tokyo, Japan, duly commissioned and qualified, acting under the authority of a certain stipulation for taking oral designations abroad, and upon order of the United States District Court, made and entered March 22, 1949, in the Matter of the United States of America, Plaintiff, vs. Iva Ikuko Toguri D'Aquino, Defendant, pending in the Southern Division of the United States District Court, for the Northern District of California, and at issue between United States of America vs. Iva Ikuko Toguri D'Aquino, do hereby certify that in pursuance of the aforesaid stipulation and court order and at the request of Theodore Tamba, Counsel for the defendant Iva Ikuko Toguri D'Aquino I examined George Ozasa, at my office in Room 335, Mitsui Main Bank Building, Tokyo, Japan, on the twentieth day of April, A.D. 1949, and that the said witness being to me personally known and known to me to be the same person named and described in the interrogatories, being by me first sworn to testify the truth, the whole truth, and nothing but the truth in answer to the several interrogatories and cross-interrogatories in the cause in which the aforesaid stipulation, court order, and request for deposition issued, his evidence

was taken down and transcribed under my direction by Irene Cullington, a stenographer who was by me first duly sworn truly and impartially to take down in notes and faithfully transcribe the testimony of the said witness George Ozasa, and after having been read over and corrected by him was subscribed by him in my presence; and I further certify that I am not counsel or kin to any of the parties to this cause or in any manner interested in the result thereof.

In witness whereof, I have hereunto set my hand and seal of office at Tokyo, Japan, this fifth day of May, A.D. 1949.

/s/ THOMAS W. AINSWORTH,
Vice Consul of the
United States of America.

[American Consular Service Seal.]

Service No. 806; Tariff No. 38; No fee prescribed.

[Endorsed]: Filed Aug. 25, 1949.

No. 12383

United States
Court of Appeals
for the Ninth Circuit.

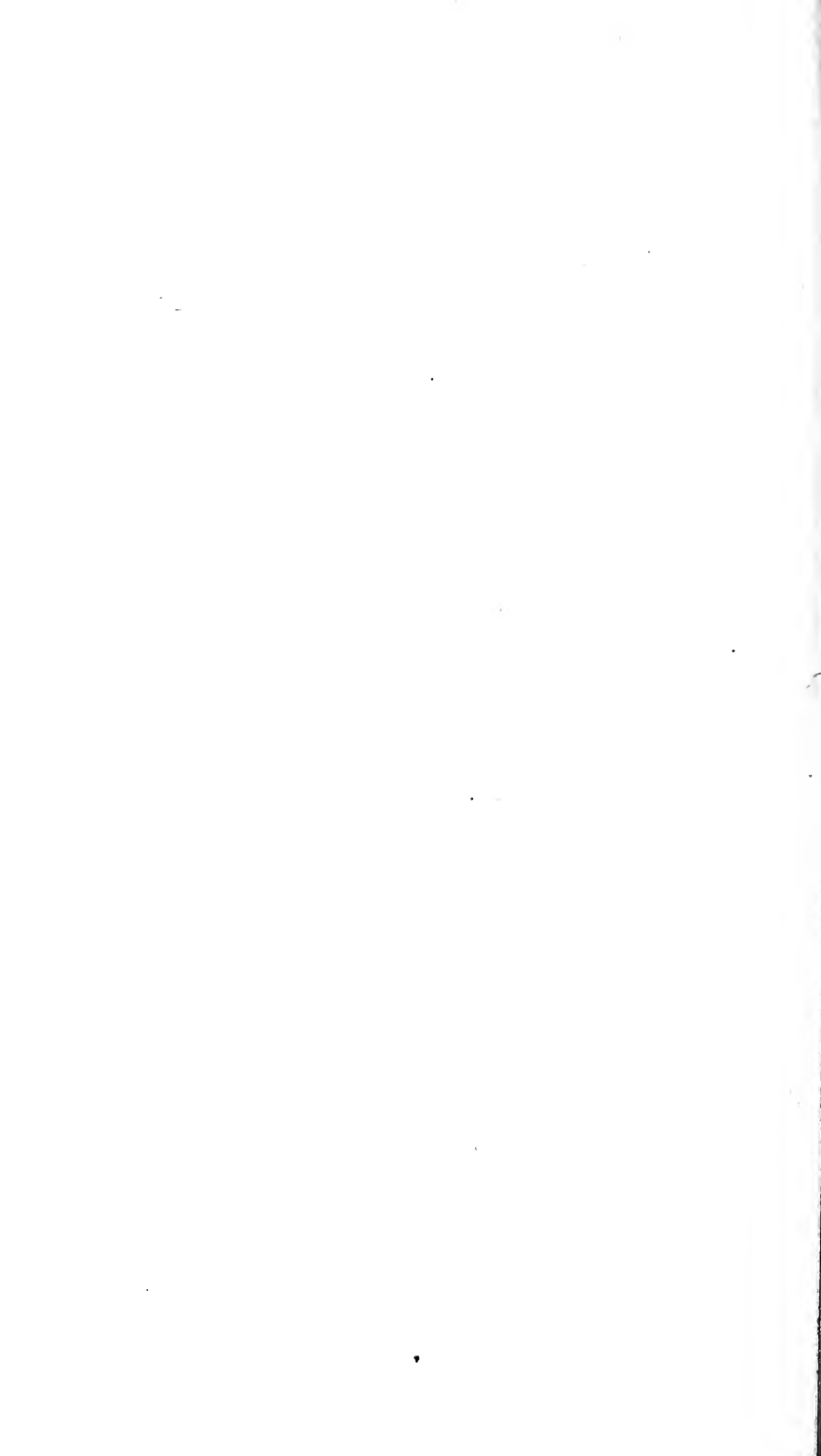
IVA IKUKO TOGURI D'AQUINO,
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UNITED STATES OF AMERICA,
Appellee.

Transcript of Record
In Two Volumes
Volume II
(Pages 463 to 871)

Appeal from the United States District Court,
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FILED

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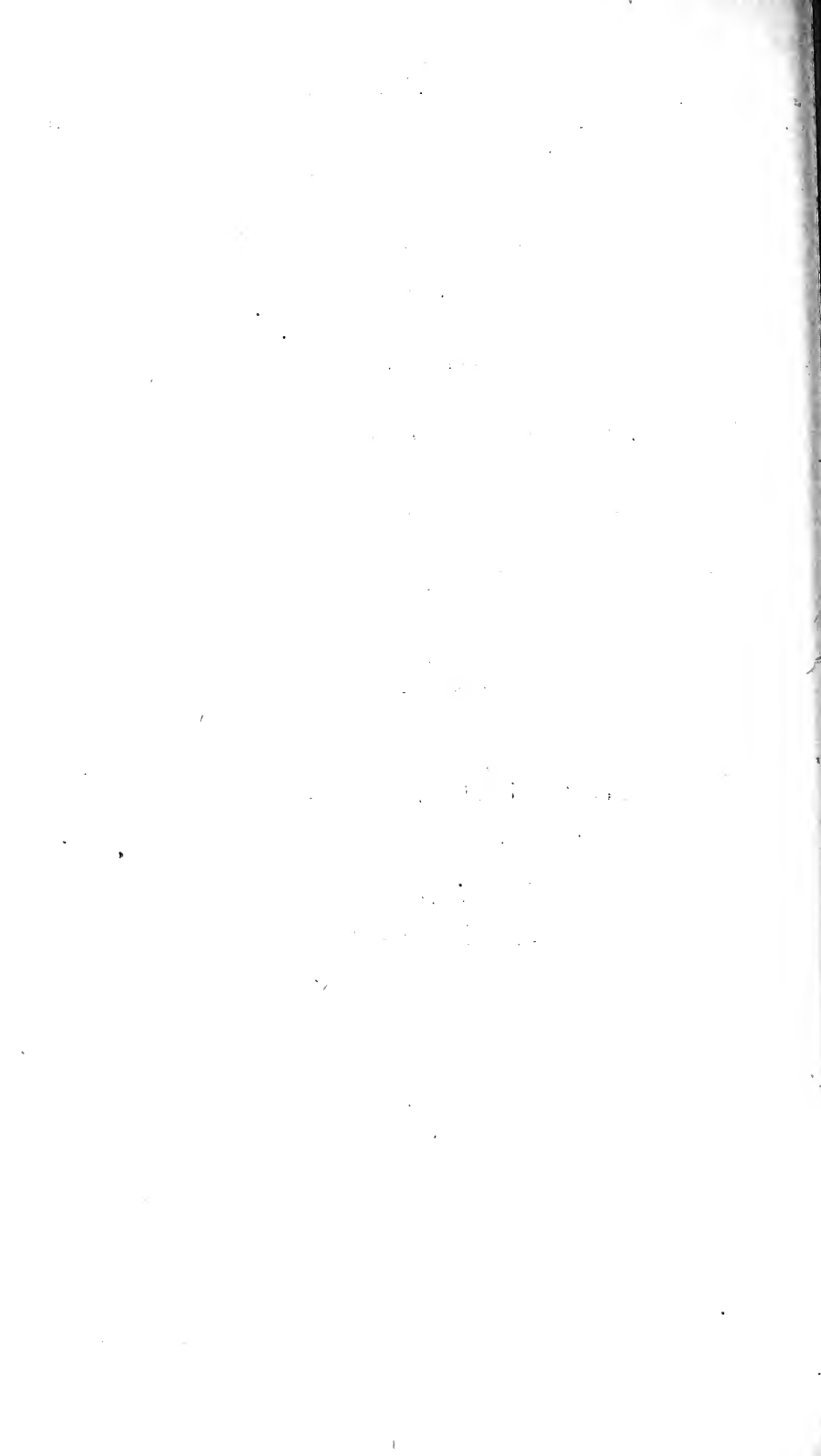
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In the Southern Division of the United States
District Court for the Northern District of
California

No. 31712 R

UNITED STATES OF AMERICA,

Plaintiff,

vs.

IVA IKUKO TOGURI D'AQUINO,

Defendant.

DEPOSITION OF NICOLAAS SCHENK

Deposition of Nicolaas Schenk, taken before me, Thomas W. Ainsworth, Vice Consul of the United States of America, in Mitsui Main Bank Building, Room 335, in Tokyo, Japan, under the authority of a certain stipulation for taking oral designations abroad, and upon order of the United States District Court, made and entered March 22, 1949, in the Matter of the United States of America vs. Iva Ikuko Toguri D'Aquino, pending in the Southern Division of the United States District Court, for the Northern District of California, and at issue between the United States of America vs. Iva Ikuko Toguri D'Aquino.

The plaintiff, appearing by Frank J. Hennessy, United States District Attorney; Thomas DeWolfe, Special Assistant to the Attorney General, and Noel Story, Special Assistant to the Attorney General,

and the defendant, appearing by Wayne N. Collins and Theodore Tamba.

The said interrogations and answers to the witness thereto were taken stenographically by Mildred Matz and were then transcribed by her under my direction, and the said transcription being thereafter read over correctly to the said witness by me and then signed by said witness in my presence.

It is stipulated that all objections of each of the parties hereto, including the objections to the form of the questions propounded to the witness and to the relevancy, materiality and competency thereof, and the defendant's objections to the use of the deposition, or any part of the deposition, by plaintiff, on the plaintiff's case in chief, shall be reserved to the time of trial in this cause.

NICOLAAS SCHENK

of Tokyo, Japan, assigned to the Netherlands Mission in Japan, of lawful age, being by me duly sworn, deposes and says:

Direct Examination

By Mr. Tamba:

Q. Lt. Schenk, what is your full name?

A. Nicolaas Schenk, Sub-Lieutenant.

Q. And you are presently connected with the Netherlands Legation?

A. I am working as custodial officer of the Netherlands Mission in Japan, Tokyo.

Q. You are a citizen and national of the Netherlands?

A. Of the Netherlands, yes, sir.

(Deposition of Nicolaas Schenk.)

Q. And you were a prisoner of war at Camp Bunka? A. Yes, sir.

Q. When and where were you captured by the Japanese forces?

A. I was captured the 6th of May, 1942, in Pale-dang Soetji, Java.

Q. After your capture where were you taken?

A. To a prison in Garoet, and upon release from prison, interned in a prisoner of war camp.

Q. Where was that prisoner of war camp?

A. Also in Garoet, the same place.

Q. When you were first apprehended were you interviewed by the Kempei-tai?

Mr. DeWolfe: Objected to as incompetent, irrelevant and immaterial, too remote, not competent; it doesn't have to do with Radio Tokyo, this man was not on Radio Tokyo on the Zero Hour program.

The Court: Submitted?

Mr. Collins: Yes.

The Court: The objection will be sustained.

(A. Yes, sir.)

Q. Tell us generally what that interview consisted of.

Mr. DeWolfe: Objected to as incompetent, irrelevant and immaterial.

The Court: The objection will be sustained.

(A. Mainly, torture.)

Q. Can you describe the torture?

Mr. DeWolfe: Objected to as immaterial and incompetent.

(Deposition of Nicolaas Schenk.)

The Court: The objection will be sustained.

(A. Standing out in the sunshine for a couple of hours with arms stretched sideways, standing at attention all the time.)

Q. How about food and water?

Mr. DeWolfe: Objected to as irrelevant.

The Court: The objection will be sustained.

(A. None.)

Q. When you went to this prisoner of war camp, how long did you remain there?

A. I remained there until July of the same year, 1942. I was then transferred to a camp in Tjimahi.

Q. How long did you remain at that camp?

A. Until September of the same year. Afterwards I was transferred to Batavia.

Q. How long did you remain in that camp? In the camp in Batavia?

A. Until December of the same year.

Q. And eventually you were brought to Japan?

A. Brought to Japan in June, 1943.

Q. And when you were brought to Japan where were you taken?

A. To the mine workers camp, Orio, Kyushu. Coal mine.

Q. You worked in the coal mines? A. Yes.

Q. How long did you remain there?

A. Until I was brought to Tokyo in September, 1943.

Q. And where were you taken in Tokyo?

A. First to Camp Omori and in October, be-

(Deposition of Nicolaas Schenk.)

ginning of October, I believe, it was the same year, I was brought to Bunka Camp, Kanda.

Q. Were you told why you were brought to Bunka Camp? A. No, sir.

Q. And was Bunka camp known by any other name than Bunka camp?

A. The name Bunka became known to us after we were in the camp but before that we did not know the name.

Q. And I assume you were there with a number of other prisoners of war?

A. We came up to Tokyo with a whole bunch of people, and from about fifty to sixty people who were kept secluded from the other prisoners, there were selected about a dozen who were told to pack their belongings and were put on a truck and brought to the camp which we later learned to be Bunka Camp.

Q. Were you given any orders, at Bunka Camp, to broadcast?

Mr. DeWolfe: Objected to as immaterial, nothing to do with the Zero Hour program, too remote.

Mr. Collins: That remains to be seen, if Your Honor please.

The Court: Submitted?

Mr. Collins: That is the time they were brought here, apparently in December of 1943. Yes.

Mr. DeWolfe: Object to it likewise as hearsay.

The Court: Submitted?

Mr. Collins: Yes.

(Deposition of Nicolaas Schenk.)

The Court: The objection will be sustained. [2*]

(A. The first speech we got did not actually say what the work would be. However, it was pointed out that the Japanese expected us to cooperate with them to secure peace, and those who did not want to cooperate would be executed.

Q. Who made that speech?

Mr. DeWolfe: Objected to as hearsay, incompetent, irrevelant and immaterial.

Mr. Collins: I might point out, if your Honor please, that this is the speech of Major Tsuneishi, this is direct impeachment of the testimony of Major Tsuneishi, and the preceding question goes direct to the very same thing.

The Court: The objection will be sustained.

(A. That was made, I believe, by Major Tsuneishi.)

Q. Was that speech translated into English?

Mr. DeWolfe: Objected to as hearsay, irrelevant, not germane to the case, incompetent, not related to the Zero Hour.

The Court: The objection will be sustained.

Mr. Collins: It goes to the question of duress, if your Honor please, which was directly communicated to the defendant by the testimony of the witness Cousens.

The Court: The court has ruled.

(A. It was translated into the English language by either Uno or Ikeda.)

* Page numbering appearing at top of page of original Reporter's Transcript.

(Deposition of Nicolaas Schenk.)

Q. Was Tsuneishi wearing his uniform?

Mr. DeWolfe: Objected to as not germane, hearsay, incompetent.

The Court: The objection will be sustained.

(A. I have never seen Major Tsuneishi in other dress than uniform.)

Q. Did he have any other things with his habit besides the uniform?

Mr. DeWolfe: Objected to as incompetent, irrelevant and immaterial.

The Court: The objection will be sustained.

(A. You are referring to a sword?) [3]

Q. I am referring to a sword.

Mr. DeWolfe: I object to that as irrelevant, immaterial, incompetent.

The Court: Objection sustained.

(A. He always wore a sword.)

Q. Did you ever see Tsuneishi without a sword?

Mr. DeWolfe: Object to that as incompetent, irrelevant and immaterial.

The Court: Objection sustained.

(A. No, sir.)

Q. Did he wear any insignia of a staff officer?

Mr. DeWolfe: Objected to as irrelevant.

The Court: The objection will be sustained.

(A. He wore on the left shoulder the gold wire gadget which was designed for the general staff.)

Q. When this speech was made, what happened?

Mr. DeWolfe: Objected to as incompetent.

The Court: The objection will be sustained.

(Deposition of Nicolaas Schenk.)

(A. A British citizen by the name of Williams stepped forward and told, in so many words, that he was not capable of giving any cooperation whatsoever.)

Q. What happened to Williams?

Mr. DeWolfe: Objected to as incompetent.

The Court: What happened to who?

Mr. DeWolfe: And hearsay.

The Court: Read that question again.

Q. What happened to Williams?

The Court: Williams?

Mr. Collins: Yes.

Mr. DeWolfe: He is another prisoner of war.

Mr. Collins: Well, may I state this, if Your Honor please, to refresh the recollection of the court. In connection with this very question, the testimony of Major Tsuneishi related directly to this very occurrence.

The Court: What occurrences? [4]

Mr. Collins: The occurrences at Camp Bunka on the occasion of his speeches to the prisoners of war there assembled to his two distinct speeches, as to what Major Tsuneishi said. And what he did not say.

The Court: I am satisfied we are going afield if we indulge in that line of examination. I always try, and always have tried, to be very liberal in relation to the admissibility of any evidence; I have allowed the widest scope. Now I am prepared to

(Deposition of Nicolaas Schenk.)

rule on this question, and I will sustain the objection.

(A. He was immediately brought away.)

Q. Were you ever told what happened to Williams at that time?

Mr. DeWolfe: Objected to as hearsay, incompetent, irrelevant.

The Court: Objection sustained.

(A. We were not told, but upon questioning by us we were given to believe that Williams was executed.)

Q. Now, was any speech made after that by Major Tsuneishi, in the dining room?

Mr. DeWolfe: Object to that as incompetent, irrelevant, and immaterial.

The Court: Yes, the objection will be sustained again.

Mr. Collins: I call your Honor's attention to the impeachment of the testimony of Major Tsuneishi, given on that stand.

The Court: For that limited purpose I will allow it. With the hope that we will go along here and finally get through.

A. We had a speech almost every day in the period of about two, three months, and all the speeches were, to my opinion, intended to break us down mentally and to force us to believe that there was no way out and that it was the pure intention of the Japanese to use us as a vehicle for their own means and if we were not willing to do what they

(Deposition of Nicolaas Schenk.)

wanted us to do, well, then there was a way out—to execute us. One line I particularly remember is that “nothing is guaranteed.” It was used almost daily by Ikeda and Buddy Uno. [5]

Mr. DeWolfe: Move to strike that answer, your Honor, as not responsive to the question. The question was, “Was any speech made”? And then he goes into his opinion.

The Court: I will allow the question and answer to stand.

Q. Do you recall a speech made by Tsuneishi, which was translated by Uno or Ikeda in the dining room, which I referred to as the second speech, that there were no guards to be posted around the camp?

A. Yes, sir, I do.

Mr. DeWolfe: Objected to as immaterial, incompetent, irrelevant, and too remote to the issues involved. It relates to Camp Bunka. It does not relate to the Zero Hour program. It is going into a collateral matter, not involving an issue in the trial of this case.

Mr. Collins: It goes directly to the circumstances under which the prisoners of war were held at Bunka, and the facts of the duress were communicated to the defendant, and the witnesses at this trial have so testified.

The Court: The objection will be sustained.

(A. Yes, sir, I do. It was during the evening meal. We had on the second floor of the location where we were billeted, what we called the dining

(Deposition of Nicolaas Schenk.)

room. By that time Tsuneishi held a speech and it was translated to us by Uno, in which he urged each that, as we could see, there were no fence around except a wall which could be easily climbed over, but he wanted us to know that this was particularly to see how it worked upon us because he wanted us to realize that we were white men and the surroundings were Japanese and he could swear that anybody of us coming across the fence would be brought back in pieces.)

Q. What were your official duties at the camp when you first got there?

A. I was put in charge of the food supplies, and its preparing, and as an assistant I got an Australian boy by the name of Parkyns.

Q. In other words, you were the cook?

A. Yes, the cook. [6]

Q. How was the food you got there? Was it adequate?

Mr. DeWolfe: I object to that as incompetent, irrelevant and immaterial; a collateral matter. It does not involve the Zero Hour at Radio Tokyo. This man was not on that program.

Mr. Collins: It relates to the conditions of duress under which the defendant was held. Those facts were communicated to the defendant.

Mr. DeWolfe: These facts were not, according to the testimony of this witness, communicated to the defendant. There is no showing to that effect.

Mr. Collins: There is a showing to that effect by

(Deposition of Nicolaas Schenk.)

the witness who testified they were retained there and they were starved.

The Court: The objection will be sustained.

(A. Absolutely inadequate.)

Q. Please tell us in what particular?

Mr. DeWolfe: I object to that as too remote, incompetent, irrelevant, nothing to do with the Zero Hour.

The Court: The objection will be sustained.

(A. We got a ration of three teacups of kaoliang per day and three bowls of soup to get that down with. The bowls of soup were a little bit larger than the teacups. The soup merely consisted of daikon, which is horse-radish, a little salt, a little soya, to which water was added.)

Q. What does this kaoliang consist of?

Mr. DeWolfe: That is a food, I presume, Your Honor. I object to it as incompetent, irrelevant and immaterial.

The Court: The same ruling. Objection sustained.

(A. The kaoliang is a kind of a corn which the encyclopedia describes as a vehicle to fill the bellies of chicken, and its effect is severe beri-beri and palagra.) [7]

Q. Did any of the civilian employees and officers of the Japanese army of Kempei-tai take part of your rations?

Mr. DeWolfe: Objected to as immaterial, not relevant to the issues involved.

(Deposition of Nicolaas Schenk.)

The Court: The objection may be overruled. He may answer.

A. That happened daily from the start.

Q. What did they do?

Mr. DeWolfe: I object to that as not being material to the issues involved concerning the defendant's participation in the Zero Hour program, what the Jap officers did with the prisoners of war in camp with respect to their prisoner of war rations, sir.

The Court: Submitted?

Mr. Collins: Yes.

The Court: Objection sustained.

(A. I was issued by the supply man, Ishikawa, a certain amount of rice for so many prisoners of war and by the time it was prepared I was told to separate so much for the school boys who were working there, a civilian who was supposed to be guarding us, and who spoke a little bit of English, that was three, and later that number was increased to five.)

Q. In other words, they would take their rations, and——

Mr. DeWolfe: I object to that as leading and collateral, immaterial, incompetent, nothing to do with the defendant's participation in the Zero Hour; too remote.

The Court: The objection will be sustained.

(A. And leave what was left.)

(Deposition of Nicolaas Schenk.)

Q. Did any of the prisoners of war show evidence of malnutrition?

Mr. DeWolfe: Object to that as having nothing to do with the issues here involved; incompetent and irrelevant.

The Court: The objection will be sustained.

Q. Will you describe some of these effects?

Mr. DeWolfe: I object to that as incompetent, irrelevant and immaterial.

The Court: The objection is sustained.

(A. Kalbfleisch broke out into boils in a very short time. McNaughton got the same trouble. Major Cox laid down for about [8] three months, not being able to move; Larry Quilly lost in about six months about forty pounds; I, myself, suffered a diminishing of eyesight, and later my legs, what you call the adequate name they got for it, my legs did not come in use.)

Q. In other words, your legs would not function?

Mr. DeWolfe: I object to that as immaterial and incompetent.

The Court: Objection sustained.

(A. Yes.)

Q. Was beri beri prevalent in the camp?

Mr. DeWolfe: I object to that as incompetent, irrelevant and immaterial.

The Court: Objection sustained.

Mr. Collins: May I point out that these matters were communicated to the defendant?

(Deposition of Nicolaas Schenk.)

The Court: Who is testifying?

Mr. Collins: This is Nicolaas Schenk, prisoner of war, who was detained there.

The Court: The Court has ruled. There is no connection between this witness testifying now and the issues involved in this case, which concern acts alleged to have occurred at this radio broadcasting station.

(A. All of us had it.)

Q. Do you recall any prisoner of war suffering from temporary blindness?

Mr. DeWolfe: Objected to as too remote, immaterial and incompetent, nothing to do with the issues here involved.

The Court: Objection is sustained.

(A. Capt. Kalbfleisch was complaining of it, and, I believe, Mark Streiter.)

Q. Do you recall any of the prisoners of war losing their hair because of deficiency of vitamins in their diet?

Mr. DeWolfe: Objected to as calling for conclusion; incompetent and immaterial.

The Court: Objection sustained.

(A. I believe it was Larry Quilly.) [9]

Q. Would you tell us what you did, or other prisoners of war did, in order to secure food around the camp?

Mr. DeWolfe: Objected to as immaterial and incompetent.

The Court: Objection sustained.

(A. Sometimes Major Cousens, Capt. Ince,

(Deposition of Nicolaas Schenk.)

brought some foodstuffs he got from the boys and girls at Radio Tokyo; we had, further, an old lady and a husband living in the basement of our quarters, who were sent out once in a while to get us some food items and the rest was stolen and we grazed the trees.)

Q. What do you mean by grazed the trees?

Mr. DeWolfe: Objected to as immaterial and incompetent.

The Court: Objection sustained.

(A. We collected the young leaves from the trees. We had several trees around the place and we used to take the young leaves because it was proven in Singapore that they were quite edible.)

Q. How about dogs and cats?

Mr. DeWolfe: Objected to as incompetent, irrelevant and immaterial.

The Court: Objection sustained.

(A. We had quite a few when we came and when we left there were none.)

Q. How many did you consume?

Mr. DeWolfe: Objected to as incompetent, irrelevant and immaterial.

The Court: Objection sustained.

(A. I personally killed two cats.)

Q. What other prisoners of war?

Mr. DeWolfe: Objected to as incompetent, irrelevant and immaterial.

The Court: Objection sustained.

Q. Did you consume any dogs?

(Deposition of Nicolaas Schenk.)

Mr. DeWolfe: Objected to as immaterial and incompetent.

The Court: Objection sustained.

(A. Yes, sir.)

Q. How many, do you recall?

Mr. DeWolfe: Objected to as immaterial and incompetent and irrelevant. [10]

The Court: Objection sustained.

(A. At least two.)

Q. Incidentally, was Kalbfleisch taken away from the camp?

Mr. DeWolfe: Objected to as hearsay; incompetent, irrelevant and immaterial. Kalbfleisch is here as a defense witness. I do not know whether his testimony is going to become competent on that point. It is better to wait and see.

Mr. Collins: This is testimony of the circumstances under which Kalbfleisch was taken away. The fact was communicated to the defendant. Kalbfleisch was taken away to be executed.

Mr. DeWolfe: There is no such showing.

The Court: The objection is sustained.

(A. Kalbfleisch was taken away, I believe, in the middle or the beginning of 1944, I am not sure. He was taken away very suddenly. We were called together in the room by Uno and somebody from the Japanese headquarters of the general staff read to us in Japanese, which was partially translated by Uno, and Kalbfleisch was led away, brought upstairs to the officers' room, to pack a few things,

(Deposition of Nicolaas Schenk.)

and was not even able to say goodbye to any of the boys, and taken out of the camp.)

Q. Were you led to believe that Kalbfleisch was executed?

Mr. DeWolfe: Objected to as calling for a conclusion; incompetent, irrelevant and immaterial, what he was led to believe.

The Court: What he was led to believe will go out; let the jury disregard it. The objection is sustained.

(A. Yes, sir.)

Q. And how did you come to that conclusion?

Mr. DeWolfe: I object to that as calling for a conclusion.

Mr. Collins: This relates now to what they were told by the officers at Bunka.

The Court: Objection sustained.

(A. Uno told us during a discussion on commentaries. I believe it was to Shattles, who refused to take a part in a script from Mark Streiter, that in case he refused to obey orders he would go the same way as Kalbfleisch. They were intending to say that Kalbfleisch was executed.) [11]

Q. Let me ask you, Lt. Schenk, did any of the prisoners of war voluntarily broadcast over the Japanese radio?

Mr. DeWolfe: I object to that as calling for a conclusion of law.

The Court: Objection sustained.

(A. Not to my opinion, sir.)

(Deposition of Nicolaas Schenk.)

Q. Were any of the prisoners of war around the camp slapped by Japanese army officers or civilians.

Mr. DeWolfe: I object to that as incompetent, irrelevant and immaterial; not connected with the defendant or the issues here involved.

The Court: Objection sustained.

(A. Quite repeatedly.)

Q. Who, sir?

Mr. DeWolfe: I object to that as incompetent and immaterial.

The Court: Objection sustained.

Mr. Collins: May I point out, if your Honor please, that that very question goes to the question of whether or not a member of the Zero Hour program himself was beaten.

The Court: Read the question again.

Mr. Collins: The question was, "Who, sir?" The preceding question to which there was an answer was: "Were any of the prisoners of war around the camp slapped by Japanese army officers or civilians?"

The Court: I sustained the objection.

(A. Leaving myself out, I know and I have seen that Larry Quilly has been beaten quite repeatedly; that Capt. Ince was beaten quite severely; that Henshaw has been beaten; Parkyns, Shattles and myself.)

Q. Who beat the prisoners of war?

Mr. DeWolfe: I object to that as immaterial and incompetent and irrelevant.

(Deposition of Nicolaas Schenk.)

The Court: Objection sustained.

(A. Lt. Hamamoto; a sergeant from the Kempei tai, I do not recall his name though; and Mr. Uno, and two or three other Japanese whom I am not able to recall by name. Shishikara was another name, and Endo.)

Q. Did Ikeda beat the prisoners?

Mr. DeWolfe: Objected to as incompetent, irrelevant and immaterial.

The Court: Same ruling.

(A. Ikeda never did.)

Q. Who was Ikeda's brother-in-law?

A. He brought the brother-in-law in who was presented to us as a director of music.

Q. Was he at the camp?

A. He was—he did not give to me the impression as being regularly connected with the camp, but he came a few times.

Q. Was Hamamoto under Tsuneishi?

A. Yes, sir.

Q. And Ikeda? A. I think so.

Q. And Uno? A. Same.

Q. And the sergeant you mentioned?

A. Yes, sir.

Q. Was the Kempei tai stationed at the camp continually?

Mr. DeWolfe: I object to that as immaterial and incompetent; not connected with the issues in the case.

(A. Yes, sir.)

Q. Did they keep a room at the camp?

(Deposition of Nicolaas Schenk.)

Mr. DeWolfe: Same objection.

The Court: Same ruling. The objection is sustained.

(A. They kept a room. Lt. Hamamoto kept a room directly across the prisoner of war location; the sergeant occupied a room on top of the main building, looking quite directly into the rooms of the enlisted men and officers, while some other fellows had their room on the right side of the camp so that we really were rather good guarded.) [13]

Q. Will you tell us about the occasion when Capt. Ince was slapped.

Mr. DeWolfe: I object to that as being incompetent, irrelevant and immaterial.

The Court: When?

Mr. Collins: This is in December, 1943, if your Honor please, while they were on the Zero Hour program.

The Court: That question does not indicate the time.

Mr. Collins: The foundation is laid for the very time by the testimony of other witnesses.

The Court: The objection will be sustained.

(A. Captain Ince. I saw him beaten once during a morning exercises. Ince was quite a while sick, suffering from neuralgia and beri-beri, and was a weak fellow. In fact he weighed at that time about one hundred and thirty pounds, at the most, and he was about a head taller than I am, so it was not much. We were standing in the courtyard and Ince

(Deposition of Nicolaas Schenk.)

was called out that he had to go out and do exercise, by the sergeant of the Kempei tai. So Ince came out in line and were were told to do an exercise by which the head had to bend low, and doing that on an empty belly, it made Ince, as well as others, dizzy, so Ince was trying to get up again, and was a little too groggy, and at that moment we heard a loud scream and Lt. Hamamoto came out from his room, running into the courtyard directly up to Ince and with all his might he placed an uppercut on Ince's chin and Ince was knocked out and lay unconscious for a few minutes. From personal experience I would like to add to this that I know that the swing from Lt. Hamamoto was pretty severe because he knocked me out, myself, when I complained about food, and it took me four days to recover from that.)

Q. When the prisoners of war were first ordered to broadcast, were they broadcasting from scripts prepared by themselves? A. No, sir. [14]

Mr. DeWolfe: What line is that?

Mr. Tamba: 22.

Mr. Collins: Page 9.

Mr. DeWolfe: I am sorry. I was looking at a criminal rule with respect to this.

The Court: We will take a recess so you can look further.

Mr. DeWolfe: I was looking at a rule on this point and I lost the place.

(Thereupon a recess was taken.)

(Deposition of Nicolaas Schenk.)

(The deposition of Nicolaas Schenk is being read.)

The Court: Proceed.

Mr. Collins: Line 25.

Q. Who prepared the scripts, if you know?

Mr. DeWolfe: I object to that as incompetent, irrelevant and immaterial, having nothing to do with the Zero Hour.

The Court: Nothing to do with the script?

Mr. DeWolfe: These are scripts of the Zero Hour program.

Mr. Collins: You are assuming something, Mr. DeWolfe.

The Court: I will allow it. The objection is overruled.

A. We were later told by Hiyoshi and Osaki that the scripts were prepared by people working at Domei, who received a pretty good payment for it.

The Court: The objection will be sustained. Let it go out and let the jury disregard it.

Q. Later were prisoners of war ordered to prepare the scripts?

Mr. DeWolfe: Objected to as incompetent, irrelevant and immaterial, not relative to the issues here involved.

The Court: I will allow him to answer.

A. Yes.

Q. Tell us about the blackboard assignments.

Mr. DeWolfe: I object to that as incompetent,

(Deposition of Nicolaas Schenk.)

irrelevant and immaterial. These are prisoner of war broadcasts. They have nothing to do with the Zero Hour.

Mr. Collins: You are assuming something there, Mr. DeWolfe.

Mr. DeWolfe: There is no testimony hooking it up with the issues involved. [15]

The Court: I have not seen those depositions at all. I do not know what is in them and I do not know what follows. Unless they are connected up, of course they will have to go out. I will sustain the objection.

(A. Uno came over to our quarters and told us that Tsuneishi had ordered that the blackboard should be put on the wall, bearing the names of all prisoners of war and showing exactly their activities in connection with the program. We were called to attention in the bedroom and Uno pointed out that each and everyone of us had to participate in the broadcast and full cooperation was expected, otherwise nothing would be guaranteed. In spite of the rather severe instructions from Uno a few of us made some comment to the effect as: "Sir, I have never broadcast," and "I am stammering," like Lance Corporal Bruce, British Forces and I, myself, pretended that I could not speak English or understand it well enough, and also a few others, whom I do not recall by name. To all this Uno said that he had nothing to do with that; we had to broadcast. The scoreboard was put in the officers'

(Deposition of Nicolaas Schenk.)

room and Uno himself marked off on that board how many commentaries were turned in; how many were approved; how many were broadcast, and other activities, and later, much later, when we got our first Red Cross packages this scoreboard was used as the determination of who would get Red Cross packages, and who would not.)

Q. When did you receive your first Red Cross package?

Mr. DeWolfe: Objected to as incompetent, irrelevant and immaterial.

The Court: Objection sustained.

(A. If I remember well I got my first Red Cross package in the end of 1944.)

Q. Was that the first time Red Cross packages were seen around the camp?

Mr. DeWolfe: Same objection.

The Court: Objection sustained.

A. That was the first I had seen in my life.

Q. Was it or was it not intact?

Mr. DeWolfe: Objected to as immaterial and incompetent. [16]

The Court: Objection sustained.

(A. The first was intact.)

Q. How about the subsequent ones?

Mr. DeWolfe: Object to that as incompetent and immaterial.

The Court: Same ruling.

(A. They had chocolate missing, cigarettes missing. As I was very fond of Camel cigarettes, I was offered by one of the girls working for Tsuneishi

(Deposition of Nicolaas Schenk.)

to swap the Camels for Chesterfields because her brother liked Chesterfields better, which he smoked before the war.)

Q. Did these prisoners of war ever receive any hospital treatment when they were sick?

Mr. DeWolfe: I object to that as too general, incompetent, irrelevant and immaterial.

Mr. Collins: This relates directly to the matter of Major Cousens, if your Honor please.

The Court: The objection will be sustained.

(A. There were only two occasions, one occasion when a fellow got hospital treatment; in the case of Cousens who got a heart attack in the studio. They brought him back to the camp and upon consultation he was transferred to a hospital and when he left Uno said: "Thank God that bastard won't live long any more.")

Q. When was that, if you recall? I am referring to the time when Cousens became ill.

Mr. DeWolfe: I object to that as incompetent, irrelevant and immaterial.

The Court: Objection sustained.

(A. It must have been in 1945. I would say in the middle or little before the middle of 1945.)

Q. Was that the year the war ended or before that?

Mr. DeWolfe: Same objection.

The Court: Objection sustained.

(A. It was the year the war ended.) [17]

(Deposition of Nicolaas Schenk.)

Q. Oh, incidentally, were you prisoners of war preparing scripts that had a double meaning?

Mr. DeWolfe: I object to that as incompetent, irrelevant and immaterial, not relating to the Zero Hour.

The Court: Objection sustained.

(A. As soon as we were told to write our own stuff I know that all of them, with the exception of Provoo and Streiter, each and everyone of us tried to inject as much double meanings and information in the scripts as possible.)

Q. Have you any reason to believe that the information you conveyed in the broadcast was received by the American or allied forces?

Mr. DeWolfe: Objected to as incompetent, irrelevant and immaterial, and hearsay.

The Court: Objection sustained.

Mr. Tamba: Line 24 on the next page, Mr. Collins.

Mr. Collins: I will direct your Honor's attention to the fact that the answer there relates to what Major Cousens did in connection with that matter, in connection with the question propounded.

Mr. DeWolfe: It is wholly a collateral matter. The defendant's name is not mentioned. There is a lot of hearsay in it.

The Court: The objection will be sustained.

(A. I could only tell you what I know from myself. It was after I came to Manila I was interrogated several times by officers from CIC and one

(Deposition of Nicolaas Schenk.)

of them, I do not recall his name, told me that we fellows had done a mighty good job; that it was appreciated; that they had tried to come in contact with us by broadcasting short wave to us so as to get a better contact. However that they did not have any confidence in those tryings because they suspected us not to be able to receive, and afterwards I know only of one occasion which was rather touching to. It was in August we got a big air raid and were surprised there were no bombs dropped but leaflets. We got some leaflets from one Japanese who brought it to us with a rather significant remark that these leaflets "were exact opposites from what the people back home actually intended to tell us," I mean the [18] leaflet showed a prepared rice table and on one side of the rice table was one big mistake according to Japanese custom because the chopsticks were on the right side instead of front, and there were a couple of other mistakes. I brought this leaflet to Cousens and discussed it with him and he had a little experience about the Orientals and I had a little experience, and we thought it might be a good idea that they should pay more attention to this because the Japanese were extremely conscious of the customs and we finally decided, after a long stroll in the courtyard, that I should write a commentary and bring it over the air the next morning, if possible, and convey all the information to the Allies. I wrote a draft and Cousens corrected it and the next morn-

(Deposition of Nicolaas Schenk.)

ing I gave this piece to Domato who brought it to the office and told me about two hours later: "Okay, Nick, you go on the air." Two days later we got another air raid and again leaflets, and I got hold of a leaflet through Parkyns who brought one from the studio, and on those leaflets the chopsticks were placed in front and the flower vase was standing in the correct place.)

Q. In other words, the script which you prepared called attention to the fact that the original leaflet was erroneous according to Japanese etiquette?

Mr. DeWolfe: Objected to as incompetent, irrelevant and immaterial.

The Court: Objection sustained.

(A. Yes, sir.)

Q. What kind of script did you write? Covering what kind of subject?

Mr. DeWolfe: I object to that as not connected with the issues in this case and incompetent.

The Court: Objection sustained.

(A. You mean generally?)

Q. Yes.

Mr. DeWolfe: I object to that question; incompetent, irrelevant and immaterial, the same matter.

The Court: The objection is sustained.

(A. Cooking lessons; talks to the women and once in a while a [19] political commentary.)

Q. I am referring to the chopsticks. What kind of script did you use to tell the American forces

(Deposition of Nicolaas Schenk.)

about the mistake they made in the rice table setting according to Japanese custom.

Mr. DeWolfe: I object to that as incompetent, irrelevant and immaterial.

The Court: Objection sustained.

(A. I started telling them that the Japanese housewife had a hard time to get along with the rations they got; that they had a still harder time to please their husbands but nevertheless they found a way to please their husbands by cleaning the house by the time the man came home and taking the utmost care with the table arrangement so that it was perfect because the Japanese men were sticking to the customs and they want the rice table to be prepared according to the old customs; the chopsticks arranged just right, and I repeated that once more at the end of the commentary.)

Q. Camp Bunka was never bombed, was it?

A. No, sir.

Q. Was the area in the immediate vicinity of Camp Bunka bombed? A. No, sir.

Q. How far did the bombings take place with relation to the Bunka?

A. The exact bombings never came any further than the university well on the safe distance from the camp because there is a street in between and in the front street Kanda street.

Q. Is it significant to you that Camp Bunka was never bombed?

Mr. DeWolfe: I object to that as calling for a

(Deposition of Nicolaas Schenk.)

conclusion; incompetent, irrelevant and immaterial, not related to any issue in this case.

The Court: Objection sustained.

(A. Well, we hope that—at least some of us believed that our broadcasts were listened to by authorities and that they guessed our camp was there.)

Q. Was there any landmark about the place that you used? [20]

Mr. DeWolfe: Same objection.

The Court: Objection sustained.

(A. We used in a couple of scripts the smoke-stack which stands almost in the middle of Bunka.)

Q. Now, at Bunka you prisoners were quartered in the back portion of the camp?

A. Yes, sir.

Q. What was in the front portion?

A. That was occupied by the officers, from Tsuneishi and his superiors.

Q. Can you describe Major Tsuneishi to us with regard to his manners and his stature?

Mr. DeWolfe: I object to that as too general; incompetent, irrelevant and immaterial; not related to the issues in this case.

The Court: Objection sustained.

(A. Small Japanese fellow; typical army officer; arrogant, obviously suffering from an inferiority complex before white men. Tried to conceal that by acting militarily.)

(Deposition of Nicolaas Schenk.)

Q. Did you ever see him shake or rattle his sword?

Mr. DeWolfe: Objected to as incompetent, irrelevant.

The Court: Objection sustained.

(A. That was his usual custom.)

Q. Was that true likewise of Hamamoto?

Mr. DeWolfe: Objected to as irrelevant and incompetent.

The Court: Same ruling.

(A. Hamamoto had some more powers because he had more physical bearing, but otherwise had far less intelligence than Tsuneishi. Tsuneishi was more or less to be regarded as the brain while Hamamoto was to be regarded as a dumb fellow.)

Q. Did you talk with Cousens and Ince and others from time to time, about the broadcast and attempt to give information to the allies over the air?

Mr. DeWolfe: I object to that as incompetent, irrelevant and immaterial, and too general. [21]

The Court: Objection sustained.

Mr. Collins: This bears directly upon the testimony of both Cousens and Ince, if your Honor please, concerning what they were endeavoring to do.

Mr. DeWolfe: It does not say it is with reference to the Zero Hour program. It does not mention the time. It has other people in there. To me it definitely refers to another program. There is no

(Deposition of Nicolaas Schenk.)

showing it has anything to do with the program with which the defendant was involved.

Mr. Collins: You are assuming something.

The Court: The Court has ruled. The objection is sustained.

(A. We had several conferences about it. We were always planning to use the information we got into the scripts.)

Q. Lt. Schenk, you had no part in the Zero Hour, is that correct?

A. Yes, that is correct.

Q. And, therefore, you are not in a position to testify as to Iva D'Aquino, as to what she did on the Zero Hour?

A. No, sir.

Q. Did you ever have a discussion with Cousens about the work he was doing in training announcers?

Mr. DeWolfe: I object to that as calling for hearsay; incompetent, irrelevant and immaterial.

The Court: The objection is sustained.

Mr. Collins: It relates to the training even of the defendant.

The Court: The Court has ruled. The objection is sustained. It is clearly hearsay.

(A. Cousens told us that he was trying to get hold of some—to train some people who were able to convey in scripts that double meaning as good as possible and when I asked once if the double meaning is not the same no matter how you pronounce it, he said, no, in particular to a man who has to

(Deposition of Nicolaas Schenk.)

listen the double meaning becomes valuable by the pronounciation and articulation. [22]

Q. Lt. Schenk, you lived in the Orient for a number of years? A. Yes.

Q. How many? A. Up to now about 22.

Q. Did Uno come into the broadcasting room with the prisoners of war?

Mr. DeWolfe: I object to that as immaterial, no showing that it has anything to do with the Zero Hour program, too remote; incompetent, irrelevant and immaterial.

The Court: It has to do with the Zero Hour. I will allow it.

Mr. DeWolfe: I said there is no showing of that.

The Court: The question embodies that. Read the question.

Q. Did Uno come into the broadcasting room with the prisoners of war? A. Always.

Q. Where would he be sitting when you were broadcasting?

Mr. DeWolfe: I object to it as incompetent, irrelevant and immaterial. It had nothing to do with the Zero Hour program. For instance, this witness has already testified on the last page he is not in a position to testify as to Iva D'Aquino as to what she did on the Zero Hour. He had no part on the Zero Hour himself, this witness, so obviously he must be talking about some other program. It does not relate to the issues involved in this case.

(Deposition of Nicolaas Schenk.)

The Court: Objection sustained.

(A. Mostly across the man who was on the air.)

Q. And what, if anything, was he doing?

Mr. DeWolfe: Objected to as incompetent, irrelevant and immaterial.

The Court: Objection sustained.

(A. Guarding us in regard to the script.) [23]

Q. Did you know Mr. Oki?

A. I now a name Oki. I would not be able to say, "This is Oki, and this is Mr. Yoshi."

Q. When did you meet a man by the name of Mr. Oki, if you recall? A. In the studio.

Q. Did you speak to him? A. No, sir.

Q. Did he speak to you?

A. All those Japanese around there would once in a while speak to us, and the kind ones, so to say, I remember quite well because their way of speaking was different, all the others using more or less ordering form of speaking.

Q. Did Oki lead you to believe that he could not speak English?

Mr. DeWolfe: I object to that as calling for a conclusion.

The Court: Objection sustained.

(A. I know one occasion when I asked a question about needles necessary for the correct recording, I got the impression he did not understand. Later on I heard from Henshaw that that fellow had been born in the States or had been in the States and knew better English than even I did,

(Deposition of Nicolaas Schenk.)

and he said something like "You better watch that fellow."

Lt. Schenk, Mr. Storey, in one of his previous depositions, asked about supplying women to Major Cousens. Do you know something about that occasion?

A. When Major Cousens came in our camp, and he and I became very intimate, he told me that previously they had been located in the Dai Iti Hotel and that they always brought women there, and they would say: "Won't you come along with us, we are going there and there," and that he once, I believe it was once, that one of the fellows went to Yokohama and that they insisted that he take a girl but that he had only danced with that girl or just sat down and drank something and after he went home. Personally I know Cousens was of too high moral standards to forget the fact that he was married. Besides that I rather doubt that anybody living under the conditions we were living under could stand a woman. [24]

Q. Do you remember an occasion when prisoners of war at Bunka Camp asked for a priest so that they could have confession?

Mr. DeWolfe: I object to that as incompetent, irrelevant and immaterial.

The Court: Objection sustained.

(A. They asked for that repeatedly.)

Q. Did you ever receive the benefit of a priest?

(Deposition of Nicolaas Schenk.)

Mr. DeWolfe: I object to that as irrevelant and incompetent.

The Court: Objection sustained.

(A. No, sir, we even asked permission to hold ourselves a religious worship meeting, so to say, which was absolutely forbidden.)

Q. Did some Japanese general come to that camp when you first arrived?

A. We had several high ranking visitors.

Q. Do you remember one general in particular coming to the camp after Tsuneishi's first speech?

A. Yes.

Q. Do you know who that general was?

A. I am not quite sure about his name, but it was not Arusi, it was Asaka, something like that. I am not sure about the name.

Q. Do you know the Japanese name given to Bunka Camp? A. No, sir.

Q. Was there any sign in Japanese outside of the camp, indicating that it was some kind of institute? A. No, sir.

Q. Did you ever ask the intervention of any neutral government to assist the prisoners of war in that camp?

A. We expressed several times the wish to see a representative from a neutral country.

Q. Were you given that privilege?

Mr. DeWolfe: I object to that as incompetent, irrelevant and immaterial and not relevant to the issues in this case, the Zero Hour program.

(Deposition of Nicolaas Schenk.)

The Court: The objection is sustained.

(A. Never, sir.) [25]

Q. You mentioned the name Yoshi. What did he do there?

Mr. DeWolfe: I object to that as incompetent, irrelevant and immaterial, having nothing to do with the Zero Hour program.

The Court: Objection sustained.

(A. He was a young fellow, young Japanese who spoke rather fluent English, I should say, American, who told that he had been in America to buy scrap iron. He was attached to our camp as a kind of a spy and after some time being in our camp he told us: "You fellows better not talk about anything in my presence which could do harm to you because after all it is my job, do you understand?" And we understood.)

Q. Did you ever report Tsuneishi to your government after the war?

Mr. DeWolfe: I object to that as immaterial and incompetent.

The Court: Objection sustained.

(A. I reported him to my government, Major Tsuneishi, Hamamoto, Uno, and Ikeda, as war criminals.)

Mr. DeWolfe: I do not offer the cross examination. If your Honor wishes me to state the Government's position with reference to the applicability of rule 15, Federal Rules of Criminal Procedure, subdivision e, on that matter, I will.

(Deposition of Nicolaas Schenk.)

The Court: I am not familiar with it. What is it?

Mr. DeWolfe: I just do not offer the cross examination. Apparently the new criminal rules for the first time have a specific provision with reference to the taking of depositions, as your Honor is well aware, and there are two pertinent parts with reference to the matter I am now speaking about. Rule 15, subdivision e at the top says:

“At the trial or upon any hearing, a part or all of the deposition, so far as otherwise admissible under the rules of evidence, may be used if it appears:——”

and then there are certain contingencies which must occur:

“The witness is not available. The witness must be dead or outside [26] the jurisdiction of the United States.”

Later on at the end of the rule there appears the following:

“If only a part of a deposition is offered in evidence by a party, an adverse party may require him to offer all of it which is relevant to the part offered and any party may offer other parts.”

It is to some extent at least, similar to companion provisions with reference to that matter as to the use of parts of a deposition by parties litigant before a United States court as mentioned in the Federal Rules of Civil Procedure. Of course, we all know that depositions for a defendant were allow-

(Deposition of Nicolaas Schenk.)

able under certain circumstances prior to the promulgation of these Federal Rules of Criminal Procedure, but now the rules with reference to the use and the taking of depositions in a criminal proceeding pending in a United States Court have been crystallized, set down in writing, and approved by the Supreme Court of the United States, and I suppose they have the force and effect of statute and law, and my impression of them is that either party can offer a part of a deposition. I therefore do not offer the cross-examination of this witness.

The Court: Proceed.

Mr. Collins: Now if your Honor please, the defendant wishes to introduce the cross-examination of the witness into evidence, together with exhibits that were introduced into the deposition by stipulation, and attached to the deposition by counsel for the prosecution, Mr. Storey; and in addition to that, we desire to offer in the redirect examination by Mr. Tamba and the recross-examination by Mr. Storey.

The Court: I have never run into this situation before.

Mr. DeWolfe: I have never, either, sir.

Mr. Collins: Neither have we, if your Honor please, but here is a deposition which is taken abroad under rather peculiar and extraordinary circumstances, and it was the only method by which the defendant was able to obtain the testimony of

(Deposition of Nicolaas Schenk.)

witnesses abroad. I may state that the matters of cross-examination are directly [27] relevant and pertinent to the vital issues that are involved in this case, and since a portion of the deposition, that is, the direct examination, has been offered, if counsel for the prosecution is not going to read the cross-examination and the redirect and recross-examination, then the defendant insists upon the right to having this matter introduced into evidence, the testimony together with the exhibits themselves, which were offered merely for identification, but which were introduced in evidence by counsel for the prosecution in connection with the taking of this deposition.

Mr. DeWolfe: Could I make one more statement in reference to procedure? The government takes the position that Mr. Collins has the right to offer this other part, subject to any objections which the United States seeks to interpose before your Honor's ruling on that. On that matter the rules are apparently such as to give him the right to do that.

The Court: Proceed.

Mr. Collins: Yes. This is the cross-examination of the witness Nicolaas Schenk, by Mr. Storey; reading:

(Thereupon the reading of the cross-examination of the deposition of Nicolaas Schenk was commenced, the questions being read by Mr. Collins and the answers by Mr. Tamba.)

(Deposition of Nicolaas Schenk.)

Q. Did your government institute an investigation as a result of your reporting these men as war criminals? A. Never did, sir.

Mr DeWolfe: Object to that as being incompetent, irrelevant and immaterial.

Mr. Collins: That is cross-examination, if your Honor please, by the attorney for the prosecution, and it seems to me that under the circumstances they would be barred from voicing objections.

Mr. DeWolfe: Well, it is with reference to a matter that has gone out on direct, sir, in the case in chief, gone out. [28]

The Court: Read the question again.

Mr. Collins: Did your government institute an investigation as a result of your reporting these men as war criminals?

The Court: The objection will be sustained.

Q. Were these men ever tried as war criminals?

Mr. DeWolfe: I object to that as being incompetent, irrelevant and immaterial.

The Court: The objection will be sustained.

(A. No, sir.)

Q. Approximately how many Allied prisoners were in Japanese custody at the time you were selected for radio work?

Mr. DeWolfe: I object to that as incompetent, immaterial and irrelevant.

The Court: Radio work?

Mr. Collins: Yes.

The Court: On the Zero Hour?

(Deposition of Nicolaas Schenk.)

Mr. Collins: Well, it doesn't specify that it was on the Zero Hour.

The Court: The objection will be sustained.

(A. When we were brought to Omori we were gathered with about sixty people.)

Q. Do you have any idea how many allied prisoners of war were altogether in the custody of the Japanese to work for the radio?

Mr. DeWolfe: Object to that as incompetent, immaterial and irrelevant.

Mr. Collins: It is preliminary, if nothing else.

The Court: Unless it is connected with the Zero Hour, I will sustain the objection.

Mr. Collins: It doesn't so appear; it is a general answer. But it does relate to this, if I may direct your Honor's attention to it. The conditions under which people were generally selected for radio work. And I think it would pertain to the very testimony that is connected—it is connected with the testimony of Major Tsuneishi, who stated the circumstances under which people were selected from various areas, to be brought to Japan for that area. [29]

The Court: Too general, the objection will be sustained.

(A. All over Japan?)

Q. Yes.

Mr. DeWolfe: Object to that.

The Court: Objection sustained.

(A. No, sir.)

(Deposition of Nicolaas Schenk.)

Q. One hundred thousand? One hundred fifty thousand?

Mr. DeWolfe: Object to that as incompetent, immaterial and irrelevant and having nothing to do with the Zero Hour program in Radio Tokyo.

The Court: Objection sustained.

(A. It could have been any number.)

Q. How many prisoners of war were at Camp Bunka?

Mr. DeWolfe: Object to that as incompetent, immaterial and irrelevant.

The Court: Objection sustained. Proceed.

(A. In Bunka we had around twenty-five.)

Q. Twenty-five was the average while you were there?

Mr. DeWolfe: Object to that as incompetent, immaterial and irrelevant.

The Court: Objection sustained.

Mr. Collins: The answer incorporated Major Cousens and Captain Ince, if your Honor please.

The Court: I think there was some testimony in the record about 12 or 15 or something.

Mr. Collins: It would increase to 25 or 27, minus 2, I think.

The Court: Well, whether there was 25 or 50, what relation has it to the issues involved in this case?

Mr. Collins: Has your Honor ruled?

The Court: The objection will be sustained.

(A. When we came we had only a few but we

(Deposition of Nicolaas Schenk.)

got twenty later. Cousens and Ince were brought in, and later five other people were brought in, and later one was brought in, which made it about twenty-five.) [30]

Q. Did any prisoner of war refuse to do broadcasting for the Japanese after he had received the order to broadcast?

Mr. DeWolfe: Object to that as incompetent, irrelevant, not related to the issues in this case.

The Court: Objection sustained.

Mr. Collins: It relates—I was going to point out, if your Honor please, that it relates to the question of the orders that were given to these people and the circumstances under which they were compelled to broadcast.

The Court: What relation have those orders to the issues involved here?

Mr. Collins: It has this relation, it relates directly to the orders given to Captain Ince and Major Cousens, who were detained at Bunka, who were there ordered to broadcast by Major Tsuneishi and by others.

The Court: On the Zero Hour?

Mr. Collins: That was on the Zero Hour, yes, your Honor.

The Court: Is there anything there connecting that up with the Zero Hour?

Mr. Collins: No, save and except the general orders given to the prisoners of war at Bunka,

(Deposition of Nicolaas Schenk.)

among whose numbers were Major Cousens and Captain Ince, and as to what they must do.

The Court: Objection will be sustained.

(A. Yes, sir. Several times. It was not directly refused because of fear of dire punishment by way of execution but by trying to bring up some points which could dismiss a prisoner from broadcasting. That one instance when Shattles told Uno: "I would rather get shot than broadcast this stuff," he was taken aside by Uno and had a severe talk with him and he came to us crying and crying "What shall I do? What shall I do?" and the final thing that we thought and we told him that no government would accept such a broadcast as treason because of the fact that this was just too obvious.) [31]

Q. Isn't it a fact that George Williams, a British subject, refused outright to do propaganda broadcasts?

Mr. DeWolfe: Objected to as incompetent, immaterial and irrelevant.

The Court: Objection sustained.

(A. It was not spoken of as broadcast. Williams refused to cooperate before we even knew what was going to happen.)

Q. Was Williams killed as a result of that refusal?

Mr. DeWolfe: Objected to as incompetent, immaterial and irrelevant.

(Deposition of Nicolaas Schenk.)

The Court: Same ruling, objection will be sustained.

(A. Up to the end of the war, when I came to Manila, I never knew nothing else but that Williams was killed. In Manila I heard he was sent to another camp and held there.)

Q. Captain Kalbfleisch refused also later to do broadcasting, did he not?

Mr. DeWolfe: Same objection.

The Court: Same ruling.

(A. I don't know whether it was a question of refusal.)

Q. He was transferred from the camp?

Mr. DeWolfe: Objected to as immaterial.

The Court: Objection sustained.

(A. He was transferred suddenly and it was told to me, or to us, rather, that it was because of sabotage. I believe Uno accused him of writing double meaning scripts.)

Q. Was he executed for this?

Mr. DeWolfe: Objected to as incompetent, immaterial and irrelevant.

The Court: The objection will be sustained.

(A. I did not know any better until I met him in Manila, after the end of the war.)

Q. At the time you saw him after the war, he was all right?

Mr. DeWolfe: I object to that as incompetent, irrelevant and immaterial.

The Court: The objection will be sustained. [32]

(Deposition of Nicolaas Schenk.)

(A. He was, yes, sir. I wonder if it is of any value if I add that the man's belongings were standing in the camp for quite a number of weeks and I personally asked Uno, just to find out what happened to Kalbfleisch, isn't it necessary that we send that stuff to the boy, after all he will need it, and Uno said: "No, he will not need it." This gave me the absolute belief he was executed.)

Q. Was George Uno transferred from Camp Bunka while you were there?

Mr. DeWolfe: Objected to as not related to the issues involved in this case and incompetent, irrelevant and immaterial.

Mr. Collins: I may point out that the testimony was that Uno was one of the watchers that was sent to watch the Zero Hour program while Cousens and Ince were on that program.

Mr. DeWolfe: Now they are asking, your Honor, as I remember about what he did at Camp Bunka and whether he was transferred from Camp Bunka to some other place.

Mr. Collins: Yes, whether he was taken away from the camp.

The Court: Whether he was or not has no relevancy in this case. The objection will be sustained.

(A. Buddy Uno left the camp, I believe, in 1944, but I am not quite sure.)

Q. Are you aware of the fact that he was transferred from Camp Bunka because he mistreated Naval Lt. Henshaw?

(Deposition of Nicolaas Schenk.)

Mr. DeWolfe: Object to that as irrelevant.

The Court: Objection sustained.

(A. No.)

Q. It was not well known he was relieved because he mistreated one of the prisoners of war.

Mr. DeWolfe: Object to that as irrelevant and incompetent.

The Court: Objection sustained.

(A. No.)

Q. Was any other person connected with the camp relieved because he slapped or mistreated the prisoners of war, to your knowledge?

Mr. DeWolfe: Same objection.

The Court: Objection sustained.

(A. Not to my knowledge.) [33]

Q. Who was the protecting power for the Allied interests in Japan during the war?

Mr. DeWolfe: Object to that as irrelevant.

The Court: Who was that?

Mr. Collins: Protecting power for the Allied interests in Japan.

The Court: Objection sustained.

(A. If I am not mistaken, the Swedish Legation acted as the representatives of the Netherlands Government and the Swiss Legation represented the American and English, I am not quite sure.)

Q. Did you ever submit a formal request to Major Tsuneishi, who was in charge of that camp,

(Deposition of Nicolaas Schenk.)

to see a representative of the Swedish Government?

Mr. DeWolfe: Object to that as incompetent, irrelevant.

The Court: What is the name of this witness that is being examined?

Mr. Collins: Schenk, Nicolass Schenk, Lieutenant Nicolass Schenk.

The Court: Objection sustained.

Mr. DeWolfe: He is a Dutch prisoner of war, I think.

(A. There was no such a possibility to submit such a request.)

Q. Did you ever attempt to submit such a request to Tsuneishi?

Mr. DeWolfe: I object to that as not having any bearing on the issues involved, incompetent.

The Court: Objection sustained.

(A. Yes.)

Q. Did you talk to Tsuneishi?

Mr. DeWolfe: Object to that as incompetent, irrelevant.

The Court: Objection sustained.

(A. Never got the chance.)

Q. Did you ever talk to Tsuneishi at all?

Mr. DeWolfe: Same objection.

The Court: Same ruling.

(A. Never got the chance.) [34]

Q. Did you ever protest to Major Tsuneishi about misappropriation of Red Cross parcels which

(Deposition of Nicolaas Schenk.)

were supposed to be distributed in the camp?

Mr. DeWolfe: Same objection.

The Court: Objection sustained.

(A. I protested to the interpreter—that means to say protest is too strong an expression. I told the interpreter that to my belief there were more Red Cross packages across the way, and whether he would be so kind as to call Major Tsuneishi's attention to that?)

Q. Did you ever request through the interpreter to have an interview with Major Tsuneishi?

Mr. DeWolfe: Objected to as irrelevant.

The Court: Objection sustained.

(A. These requests were always——)

Q. Did you ever make such a request?

Mr. DeWolfe: Object to that as incompetent, irrelevant.

The Court: Objection sustained.

(A. Oh, yes.)

Q. After you had made this request to have the Red Cross packages distributed, were they distributed?

Mr. DeWolfe: Same objection.

The Court: Same ruling.

(A. No, sir.)

Q. They were not distributed at all after that request was made?

Mr. DeWolfe: Same objection.

The Court: Same ruling. The objection will be sustained.

(Deposition of Nicolaas Schenk.)

(A. They were distributed to us as a kind of reward, but quite a while later.)

Q. What were the prisoners of war doing in Camp Bunka?

Mr. DeWolfe: Object to that as incompetent, irrelevant.

The Court: Objection sustained.

(A. You mean daily activity?)

Q. No, what were you, all of you, doing there?

Mr. DeWolfe: Object to as incompetent, irrelevant.

The Court: Objection sustained.

(A. Well, we had to take care of the camp. I, myself, of course, of the drawing of supplies and preparing them, and the others had their own activities, such as cleaning up the place, making the baths for the Japanese.)

Q. Were these prisoners of war broadcasting propaganda for the Japanese Government?

Mr. DeWolfe: Object to it as immaterial.

The Court: Objection sustained.

(A. All of us were connected in one way or another with the broadcast.)

Q. And the scripts were written by the prisoners of war and were designed to be propaganda against the Allied forces?

Mr. DeWolfe: Objected to as incompetent, irrelevant.

The Court: Unless it is connected up with the Zero Hour, the objection will have to be sustained.

(Deposition of Nicolaas Schenk.)

All these questions that are being propounded, the jury must regard as not evidence, and not to be considered for any purpose in this case.

(A. We got a certain subject and we got point out what we should write about.)

Mr. Collins: What is the next line, Mr. Tamba?

Mr. Tamba: I think it is 14, unless I got lost.

Q. And the scripts were written by the prisoners of war and were designed to be propaganda against the Allied forces?

Mr. Collins: Did I just read that?

Mr. DeWolfe: Objected to as irrelevant and immaterial.

The Court: I sustained the objection to that, unless it is connected up with the Zero Hour.

Mr. Collins: Well, we are endeavoring to connect that, if your Honor please, and we think that there is already testimony in the record——

The Court: Well, it may or may not develop. Unless they are connected up, it is clearly my duty to sustain the objections to them. [36]

Q. But it was propaganda?

Mr. DeWolfe: Object to that as incompetent, irrelevant.

The Court: Objection sustained.

(A. It was always more or less propaganda.)

Q. You have testified that the prisoners of war were putting a double meaning into their broadcasts?

Mr. DeWolfe: Same objection.

(Deposition of Nicolaas Schenk.)

The Court: What broadcasts?

Mr. Collins: This related just generally to the prisoner of war broadcasts, to all the prisoner of war broadcasts, not to any one particular one, but to all prisoner of war broadcasts.

Mr. DeWolfe: That is why it is objectionable, sir.

The Court: The objection will have to be sustained.

Mr. Collins: I am pointing out, if your Honor please, that if the double meanings are being put into all the prisoner of war broadcasts, pursuant to an agreement or understanding of the prisoners of war, then it includes also the Zero Hour and such other programs as the prisoners of war were compelled to broadcast on.

The Court: The objection will have to be sustained.

(A. Yes.)

Q. Give us all the examples, if you can remember them, of scripts with double meanings. You need not repeat the one you gave to Mr. Tamba with regard to the rice table.

Mr. DeWolfe: Object to it, incompetent, irrelevant.

The Court: Objection sustained.

(A. I think it is putting quite a strain on a man to recall that, but for instance I recall that in the scripts that were supposed to be prepared by Henshaw and Cousens and others, that we tried

(Deposition of Nicolaas Schenk.)

to get across how exactly the prisoners of war were treated by the Japanese; what happened to the Red Cross supplies, and what, in general, the behaviour of the Japanese was.)

Q. Tell us how you got that into the scripts?

Mr. DeWolfe: Object to that as incompetent, irrelevant.

The Court: Objection sustained. [37]

(A. It is impossible for me to recall that exactly. I cannot tell you exactly that the script contained that and that.)

Q. In other words, the only example you can remember is the one you gave Mr. Tamba?

Mr. DeWolfe: Same objection your Honor.

The Court: Objection sustained.

(A. Yes.)

Q. You have testified that you were in charge of the kitchen at Camp Bunka for a while. Were you relieved of that duty later?

Mr. DeWolfe: Same objection, sir.

The Court: Objection sustained.

(A. Yes, sir.)

Q. What was the reason given for relieving you from this duty?

Mr. DeWolfe: Same objection, sir.

The Court: Same ruling.

(A. Because they caught a couple of my boys stealing. We were on a stealing party to get food.)

Q. Did any of the other prisoners of war ever accuse you of misappropriating food in the kitchen?

(Deposition of Nicolaas Schenk.)

Mr. DeWolfe: Object to that as hearsay, calling for a conclusion, incompetent, immaterial and irrelevant.

The Court: Objection sustained.

(A. You mean the prisoners of war accusing me?)

Q. Yes.

Mr. DeWolfe: Object to that.

The Court: Objection sustained.

(A. No, sir.)

Q. Do you recall an incident that happened on February 24, 1945, when there was quite an investigation of activities in the kitchen?

Mr. DeWolfe: Object to that as incompetent, irrelevant and immaterial.

The Court: Objection sustained.

(A. You mean by the Japanese?)

Q. Yes, when the American prisoners, the other prisoners of war accused you of taking food out of the kitchen?

Mr. DeWolfe: Object to that as immaterial and incompetent. [38]

The Court: Objection sustained.

(A. Never from the American prisoners of war.)

Q. From any prisoners of war?

Mr. De Wolfe: The same objection, sir.

The Court: Same ruling.

(A. No.)

Q. Can you recall the date that you were relieved from your duties in the kitchen?

(Deposition of Nicolaas Schenk.)

Mr. De Wolfe: Objected to as immaterial.

The Court: Objection sustained.

(A. That, if I am not mistaken, was in '45, somewhere around the beginning of 1945.)

Q. You have mentioned in these orders that were given to the prisoners of war at the camp that if the prisoners of war did not cooperate with the program they would be executed. Was the word "executed" used or, that if you did not work, your life would not be guaranteed?

Mr. De Wolfe: Objected to as incompetent, immaterial and irrelevant.

The Court: Objection sustained.

(A. They used the expression "your life would not be guaranteed.")

Q. In other words, they did not say you would be executed?

Mr. De Wolfe: Same objection, your Honor.

The Court: Objection sustained.

(A. I asked Uno for their interpretation of several Japanese words and he told me that I had to understand the meaning of "nothing is guaranteed" and "your life is not guaranteed" in the way the Japanese regarded the prisoners of war and later he explained that in detail to the whole assembly of prisoners of war that prisoners of war was an unknown thing to Japanese, and, therefore, the prisoners of war were called by the name of "horyo" which also, according to him, meant to express the lowest type of criminal. [39]

(Deposition of Nicolaas Schenk.)

Q. Did you know the literal translation of the orders given by superiors, given at Camp Bunka?

Mr. De Wolfe: Answer it.

A. No, sir.

Q. Whenever you were given an official order, was it ever interpreted to the prisoners of war that they would be executed if they did not cooperate.

A. I got that impression.

Mr. De Wolfe: Objected to as incompetent, irrelevant.

The Court: What was the answer, he got that impression?

Mr. Tamba: He got that impression.

The Court: The objection will be sustained, and let it go out and let the jury disregard it.

Q. Did they say that?

Mr. De Wolfe: Object to that as hearsay, incompetent, irrelevant and immaterial, has nothing to do with the Zero Hour, as this witness has testified he didn't participate in the Zero Hour, didn't know anything about it.

The Court: Objection sustained.

(A. No, sir, not in so many words.)

Q. You have testified that on the occasions you saw Major Tsuneishi, he was always in uniform and was wearing a sword. Was the usual uniform of the Japanese officer of field rank, the carrying of a sword?

Mr. De Wolfe: I object to that as incompetent, immaterial and irrelevant.

(Deposition of Nicolaas Schenk.)

The Court: Objection sustained.

(A. I don't know, sir.)

Q. Was anyone ever killed in Camp Bunka for not carrying out orders in Camp Bunka?

Mr. De Wolfe: Objected to as incompetent.

The Court: Objection sustained.

(A. No, sir.)

Q. Was Major Tsuneishi ever present when you saw any of the prisoners of war at Camp Bunka being mistreated? [40]

Mr. De Wolfe: You may answer if you want.

A. I do not recall clearly such an occasion.

Q. What is your answer to my question?

A. No, sir.

Q. Did you know Miss Toguri at all during the time you were working at the radio station?

A. I know quite a few of the girls, but not by name, just nicknames, like Miss Toguri was called and known by the name "Anne," and so were all the other girls, I believe. I believe I saw her a couple of times at the studio around there.

Q. Did you ever see Miss Toguri broadcast?

A. No, sir.

Q. Did you ever hear one of her broadcasts?

A. No, sir.

Q. What time did your program go on the air when you were broadcasting?

Mr. DeWolfe: Will you read that question again?

Q. (By Mr. Collins): What time did your program go on the air when you were broadcasting?

(Deposition of Nicolaas Schenk.)

Mr. DeWolfe: Object to that as immaterial, it is not the Zero Hour program.

The Court: Objection sustained.

(A. Our program went on the air, I believe, between 12 and 1:00.)

Q. What time did the Zero Hour go on the air?

A. Some time in the afternoon, some time around four or five o'clock.

Q. Did you remain at the studio—at the radio station after you finished broadcasting?

A. We remained for about half an hour, sometimes an hour, and then we went. It all depended on whether our escort was there.

Q. Were you ever present at the radio station as late as six or seven o'clock?

A. I, myself, never.

Q. Have you seen the defendant since the war, Miss Toguri? A. No. [41]

Q. In other words, the only times you can ever remember seeing her are the two or three times you have testified to here? A. Yes.

Q. At any time since the end of the war, have you contacted any people in an effort to prepare the evidence for Miss Toguri's defense?

A. No, sir. May I know a little bit more about it? I say, no, but about a few weeks ago I got a letter from the lawyers firm Fred Collins in San Francisco, I believe, asking me if I can give answer to certain questions as to how her employment arose.

(Deposition of Nicolaas Schenk.)

So and so on. Later I was called by Mr. Tamba. That is the only two occasions.

Q. Since the war you have never approached any persons who were formerly connected with the radio station in an effort to prepare a defense for Miss Toguri?
A. No, sir.

Q. Do you know a person by the name of Lilly Ghevenian?
A. Lillian?

Q. Do you recall writing her a letter suggesting to get people together and prepare a defense for Miss Toguri?
A. Yes.

Q. Then the answer you gave me a little while ago is not true?

A. I wanted to have some more information on it.

Q. What did you say in that letter?

A. I don't recall but I got a letter from the lawyer and I recalled that after the war we had an investigation here about Tokyo Rose, they called this girl, and I saw the picture of the girl in the newspaper and I recalled that face as having seen once or maybe twice. I am pretty strong in remembering faces, and I immediately connected this girl with the girl I knew at that time as Ann. I knew from Cousens that that girl had been of great help to him, with the result that I tried to get—recollect everything, and later when I got that letter from the lawyers' firm, that immediately remembered that girl working there continually in Radio Tokyo [42] and she must be known by some other

(Deposition of Nicolaas Schenk.)

people whom I knew, like Lillian and Jane Sagoyan. I knew just about the address from Jean Sagoyan and I thought I better write that a girl a note so as the lawyers could get in touch with them, and if she would be of any value to use it. I don't remember what I wrote to that girl.

(During the reading of the aforesaid deposition, the following occurred:)

Mr. Collins: And then questions by Mr. Tamba. This would be redirect.

The Court: Will we be able to conclude?

Mr. Collins: It is about six or seven pages, your Honor.

The Court: The jurors may be excused until 2:00.

(Thereupon a recess was taken until 2:00 p.m. this date.)

Mr. Tamba: Line 3, page 26, Mr. Collins.

Mr. Collins: "Mr. Tamba: I demand that if you have a letter written by this witness, that he be shown it before he be requested to testify as to what he wrote in it."

Mr. DeWolfe: I have not any such letter now in our possession. I have never seen it that I recall, if the demand is renewed.

Mr. Collins: I assume that the letter was not produced. The letter was ignored. You can see that from the nature of the question.

Q. You have testified previously that you saw

(Deposition of Nicolaas Schenk.)

that girl once or twice, and that you did not know what she was doing at the radio station?

A. Well, we knew from all the Nisei girls and the Nisei boys that they were broadcasting.

Q. Why were you so anxious to help someone who collaborated with the Japanese government without knowing more about it?

Mr. DeWolfe: I will object to that as incompetent.

The Court: Objection sustained.

(A. Now we come to a very critical point. I have suffered quite a bit from this war and I know that all these Nisei boys and Nisei girls here in Japan, whether they come out here of their own free will, or forced to come back, did suffer quite a bit and it is not up to me to say whether the person has committed treason or not. Treason to me is when a person does something for gain, to get something out of it for personal benefit or out of a belief. While I personally did not believe that anybody, a Nisei boy or Nisei girl working in Radio Tokyo at that time, which the Japanese regarded as neither fish nor fowl, would be regarded as treason—to commit treason.

Q. Do you know whether or not Miss Toguri was paid at Radio Tokyo?

A. I do not care what she was paid.

Q. In other words, you are willing to defend her without knowing more than that?

Mr. DeWolfe: I object to that, Your Honor.

(Deposition of Nicolaas Schenk.)

The Court: Objection sustained.

A. I would be willing to defend her only on the fact already that she helped the prisoners of war by giving information or anything else.

Q. Did you mention that trip to the United States in this letter to these people that they would help with the defense?

Mr. DeWolfe: I object to that as incompetent.

The Court: Objection sustained.

Mr. Tamba: I again demand that if counsel has a letter written by this witness that it be shown to him before he is requested to give any further testimony as to the contents of such letter.

(Letter dated Tokyo, 24 February, 1949, addressed: "Dear Lill and Jenny" was shown to witness by Mr. Storey.)

(A. Yes.)

Q. How did you propose to arrange this trip to the United States for them?

Mr. DeWolfe: I object to that as incompetent and immaterial.

The Court: Objection sustained.

(A. I am willing to give them myself some few hundred dollars. [44] This girl Jenny Sagoyan was so good to my fellow-prisoner, to one of my mates, and did so much to keep him alive, and I am willing to pay a certain amount of money to get that girl to the States.)

Q. In other words, you are willing to go to any effort to get that girl to the United States?

(Deposition of Nicolaas Schenk.)

Mr. DeWolfe: I object to that as incompetent.

The Court: Objection sustained.

(A. No, not to any effort, but I certainly feel this is a part of my duty to help at least that girl after what she has done, even if it has not been done to myself. During that time we regarded ourselves as so close together, we went through so many things, that it was no difference whether it was for me or anyone else, even Mark Streiter.)

“Mr. Story: The prosecution would like to offer this letter as Government’s Exhibit ‘1’ in Schenk deposition.

Mr. Tamba: No objection.”

Mr. Tamba: The letter is appended to the deposition, but I understand counsel has objected.

Mr. DeWolfe: I am not offering any letter.

Mr. Collins: It was a letter which the prosecution offered. Is it attached?

Mr. Tamba: It is attached to the original.

Mr. Collins: The letter which was attached as Prosecution’s Exhibit 1 to this deposition reads as follows:

Mr. DeWolfe: I will object to it. We did not offer that exhibit, and if he offers it as part of the cross-examination, we will object to it. We did not offer any of the cross-examination. It is not proper. Objection was sustained to the direct examination. I take the position I am not offering any cross-examination.

The Court: Submitted?

(Deposition of Nicolaas Schenk.)

Mr. Collins: Yes.

The Court: Now for the purpose of the record, you may indicate the purpose of this offer [44-A]

Mr. Collins: The purpose of this offer is to show that a letter dated Tokyo, 24 February, 1949, addressed to Lt. Nicolaas Schenk, custodian officer. Netherlands Legation, General Headquarters, APO 500, care of Postmaster, San Francisco, California, and addressed to "Dear Lil and Ginny," and signed by——

The Court: The best approach to that would be to indicate in what manner this letter should go in evidence, on what theory and what relation has it to any issue in this case.

Mr. Collins: It relates to this, if Your Honor please, this request for an appointment to communicate information in the story of Radio Tokyo and to ask both of these persons, apparently Lil and Ginny, if they would go to the United States and also if they would contact all girls and boys who are acquainted with "Tokyo Rose, and tell them to communicate with the writer as soon as possible.

The Court: That has no place in this record. The objection will be sustained to it.

Mr. Collins: What line were you on?

Mr. Tamba: We are on page 28, line 1, now.

Mr. Collins: Let the record show that on page 27 Mr. Tamba stated, after Mr. Storey offered Government's Exhibit 1 attached to that deposition, that he had no objection. Now redirect examination by Mr. Tamba.

(Deposition of Nicolaas Schenk.)

Q. You feel quite keenly about the experiences you endured during the war?

Mr. DeWolfe: I object to that as not proper redirect. Cross-examination was not offered by the United States.

The Court: Objection sustained.

(A. Yes, sir.)

Q. And you know that the girl you knew as Ann did what she could for the prisoners of war?

Mr. DeWolfe: I object to that as leading, not proper redirect examination, incompetent, no cross-examination by the Government.

The Court: Clearly calling for the conclusion of the witness. The objection will be sustained.

(A. I am absolutely convinced that every Nisei girl and every Nisei boy, if they had the opportunity, would have helped us.

Q. Do you remember the incident of the blanket being brought to Camp Bunka?

Mr. Tamba: Any objection to that?

Mr. DeWolfe: No.

A. Yes.

Q. Do you know where it came from?

A. I wouldn't be able to say it came from Ann, Lillian or anyone else, but if I bring it in connection to a person who got it, and whom that person knew and was told to get in contact with, that I am almost convinced that it was Ann's.

Q. You know the blanket came to the camp?

A. Yes.

(Deposition of Nicolaas Schenk.)

Q. You also know about—you also no doubt know, Lt. Schenk, that information concerning Allied war news was supplied to Major Cousens.

A. I have said——

Q. You also know, Lt. Schenk, that sometimes food, items of food came to the camp?

A. Yes, sir.

Q. And it is your belief that it came from Ann and other Niseis? A. Yes, sir.

Mr. DeWolfe: That is calling for a conclusion.

The Court: His belief may go out. The objection is sustained.

Q. And you feel grateful for that?

Mr. DeWolfe: I object to that because he has testified only as to his belief.

The Court: Objection sustained.

(A. Yes.)

Q. And that is the reason you wrote this letter?

Mr. DeWolfe: I object to that for the same reason.

The Court: Objection sustained.

(A. Exactly.) [46]

Q. You saw me twice prior to today, Lt. Schenk?

A. Yes, sir.

Q. And I asked you if you were willing to go to the States to testify? A. Yes, sir.

Q. And you said you would be willing to go there? A. Yes, sir.

Q. I did not want to go into this, but since Mr. Storey went a little further, was the subject of cannibalism discussed among you prisoners?

(Deposition of Nicolaas Schenk.)

Mr. DeWolfe: I object to that as incompetent, improper redirect.

The Court: Objection sustained.

(A. Yes.)

Q. Tell us about it.

Mr. DeWolfe: I object to that as incompetent and immaterial.

The Court: Same ruling.

(A. We were sitting on our bunks one night, and a few of us had been punished by not eating and I was able to steal a little bit out of the Japanese ration and brought it to the people who had been punished. I don't remember the names, so after a while we were getting into the discussion "suppose you and I would sit in an open boat with nothing around us. We would be without food, so what would we do. You would watch me, expecting that I would kill you, and you say you would do the same to me." Whatever are their impressions, and we discussed that problem, that subject from all sides with the absolute belief that if it came that far that each and everyone of us would kill the other not so much for protection but to keep the belly full.)

Q. When I interviewed you, you never gave me the name of Lillian Sagoyan? A. No, sir.

Q. I talked with you about what you knew about the girls? A. That is correct, sir. [47]

Q. About this bath you mentioned to me, do you know the name of the man who was repeatedly

(Deposition of Nicolaas Schenk.)

beaten for not taking care of the Japanese bath, who was he?

Mr. DeWolfe: I object to that as incompetent, irrelevant and immaterial.

The Court: The objection is sustained.

(A. Larry Quilly.)

Q. Who beat him?

Mr. DeWolfe: I object to that as incompetent, irrelevant and immaterial.

The Court: The objection is sustained.

(A. Hamamoto and the sergeant of the Kempeitai.)

Q. Was that done frequently?

Mr. DeWolfe: Same objection to it.

The Court: Same ruling.

(A. Practically every day.)

Q. When Uno left the camp, did he make a speech and do you remember the contents or the tone, or the general import of that speech?

Mr. DeWolfe: I object to that as not bearing on any issue in the case.

The Court: Objection sustained.

(A. We held a kind of a bull session in which he said that Major Cousens was that kind of a character; that Ince was a poker player; that Ince had to be very careful because the Japanese probably could—he meant to say something of the war, that the time would not be far off when the Japanese would stand from Ince just so much; that Henshaw he regarded as a young fellow with ca-

(Deposition of Nicolaas Schenk.)

pacities but under the wrong leadership and by leadership he meant Ince, as well as Cousens, and he gave the description of everybody of us and left us more or less in the belief that he was going out to die for his country if it came so far because he was a Japanese and he was very proud of it and I believe he told us also what his brother had told him when he left.) [48]

Q. To whom did you ask—whom did you ask for the privilege to see the Swedish Legation, if you recall?

Mr. DeWolfe: I object to that as irrelevant.

The Court: Objection sustained.

(A. I am quite sure—I believe it was Osaki whom I asked once to see the Swedish representative, or the Swiss representative.)

Q. Did you come here voluntarily this morning?

A. Yes, sir.

Q. To testify in behalf of Miss Toguri?

A. Yes.

Mr. DeWolfe: The recross-examination is not offered by the Government.

Mr Collins: I will put the questions on recross.

Recross-Examination

By Mr. Storey:

Q. Did you ever see Miss Toguri at Camp Bunka? A. No.

Q. Did Miss Toguri ever give you any food?

A. No.

Q. Did Miss Toguri ever give you any medicine?

Mr. Tamba: I do not find an answer to that.

(Deposition of Nicolaas Schenk.)

Mr. DeWolfe: I do not either.

Mr. Collins: Is that the end of it then?

Mr. Tamba: On the next page.

Q. Did she ever pass on any news to you?

A. No, sir, not to me.

Mr. Collins: Is that the conclusion?

Mr. Tamba: Yes.

/s/ NICK SCHENK.

GOVERNMENT'S EXHIBIT "I"
IN SCHENK DEPOSITION

Tokyo, 24 February 1949

Lt. Nick Schenk
Custodian Officer
Netherlands Legation
General Liaison, GHQ.
APO 500, c/o P.M.
San Francisco, Cal.

Dear Lill and Jenny

I would appreciate it very much if both of you would give me an appointment as soon as possible. The thing is I would like to have some additional information in the old story of Radio-Tokyo, and if possible I would like to have both of you getting a change of going on a nice trip to the States. I also would appreciate it if you could contact all girls and boys who are acquainted with "Tokyo-Rose" and tell them to call me as soon as possible. The information I would like to have from them is

everything what can be of Value for the defense of that girl. So nobody has to fear a thing as it is for the benefit of all. Expect to receive your call soon.

Yours truly,

/s/ NICK SCHENK.

/s/ THOMAS W. AINSWORTH,

American Vice Consul.

[American Consular Service Seal.]

Japan,

City of Tokyo,

American Consular Service—ss.

CERTIFICATE

I, Thomas W. Ainsworth, Vice Consul of the United States of America in and for Tokyo, Japan, duly commissioned and qualified, acting under the authority of a certain stipulation for taking oral designations abroad, and upon order of the United States District Court, made and entered March 22, 1949, in the Matter of United States of America, Plaintiff, vs. Iva Ikuko Toguri D'Aquino, Defendant, pending in the Southern Division of the United States District Court, for the Northern District of California, and at issue between United States of America vs. Iva Ikuko Toguri D'Aquino, do hereby certify that in pursuance of the aforesaid stipulation and court order and at the request of Theodore Tamba, counsel for the defendant Iva Ikuko Toguri D'Aquino, I examined Nicolaas Schenk, at my

office in Room 335, Mitsui Main Bank Building, Tokyo, Japan, on the seventh day of May, A.D. 1949, and that the said witness being to me personally known and known to me to be the same person named and described in the interrogatories, being by me first sworn to testify the truth, the whole truth, and nothing but the truth in answer to the several interrogatories and cross-interrogatories in the cause in which the aforesaid stipulation, court order, and request for deposition issued, his evidence was taken down and transcribed under my direction by Mildred Matz, a stenographer, who was by me first duly sworn truly and impartially to take down in notes and faithfully transcribe the testimony of the said witness Nicolaas Schenk, and after having been read over and corrected by him, was subscribed by him in my presence; and I further certify that I am not counsel or kin to any of the parties to this cause or in any manner interested in the result thereof.

In witness whereof, I have hereunto set my hand and seal of office at Tokyo, Japan, this 19th day of May, A.D. 1949.

/s/ THOMAS W. AINSWORTH,
Vice Consul of the
United States of America.

Service No. 935; Tariff No. 38; No fee prescribed.

[Endorsed]: Filed May 23, 1949.

In the Southern Division of the United States
District Court for the Northern Division of
California

No. 31712 R

UNITED STATES OF AMERICA,

Plaintiff,

vs.

IVA IKUKO TOGURI D'AQUINO,

Defendant.

DEPOSITION OF TAMOTSU MURAYAMA

Deposition of Tamotsu Murayama, taken before me, Thomas W. Ainsworth, Vice Consul of the United States of America, in Mitsui Main Bank Building, Room 335, in Tokyo, Japan, under the authority of a certain stipulation for taking oral designations abroad, and upon order of the United States District Court, made and entered March 22, 1949, in the Matter of the United States of America vs. Iva Ikuko Toguri D'Aquino, pending in the Southern Division of the United States District Court, for the Northern District of California, and at issue between the United States of America vs. Iva Ikuko Toguri D'Aquino.

The plaintiff, appearing by Frank J. Hennessy, United States District Attorney; Thomas DeWolfe, Special Assistant to the Attorney General, and Noel Story, Special Assistant to the Attorney General, and the defendant, appearing by Wayne N. Collins and Theodore Tamba.

The said interrogations and answers to the witness thereto were taken stenographically by Mildred Matz and were then transcribed by her under my direction, and the said transcription being thereafter read over correctly to the said witness by me and then signed by said witness in my presence.

It is Stipulated that all objections of each of the parties hereto, including the objections to the form of the questions propounded to the witness and to the relevancy, materiality and competency thereof, and the defendant's objections to the use of the deposition, or any part of the deposition, by plaintiff, on the plaintiff's case in chief, shall be reserved to the time of trial in this cause.

TAMOTSU MURAYAMA

of Tokyo, Japan, employed by Nippon Times, of lawful age, being by me duly sworn, deposes and says:

Direct Examination

By Mr. Tamba:

Q. Mr. Murayama, what is your business or occupation?

A. Reporter for the Nippon Times.

Q. Where were you born?

A. I was born on December 24, 1905, in Seattle, Washington.

Q. Have you lived in the United States?

A. Yes.

Q. For how long a period of time?

A. About twenty years altogether.

(Deposition of Tamotsu Murayama.)

Q. Where did you receive your education?

A. Most of it in San Francisco.

Q. What schools?

A. Lowell High School and Golden Gate College.

Q. And Golden Gate College is a YMCA night school in San Francisco? A. That's right.

Q. For how many years have you been a newspaper man?

A. About twenty years. This is my twenty-first year. [2*]

Q. Have you been in any foreign countries outside of the United States?

A. Yes. All over the world.

Q. Will you please tell us what countries you visited.

A. Canada, Mexico, Panama, Peru, Chile, Argentina, Uruguay, Brazil, Great Britain, that is, England, Germany, France, Soviet Russia, Italy, Egypt, Ceylon, China, Korea, Manchuria, that's about all.

Q. That was following your occupation as a newspaper man? A. Yes, sir.

Q. You came to Japan, when?

A. 1939 was the last time.

Q. In what capacity, Mr. Murayama?

A. To take up my work with Tokyo AP office.

Q. You mean Associated Press?

A. Associated Press, right.

(Deposition of Tamotsu Murayama.)

Q. You were caught in Japan during the war, is that correct? A. Right.

Q. In the United States, have you had occasion to interview any people of prominence, in your capacity as newspaper man? A. Yes.

Q. Who, may I ask?

A. I interviewed Presidents Roosevelt and Hoover, Vice-President Garner.

Q. Any labor leaders of note?

A. Many, including William Green, John Lewis.

Q. Were you ever active in any American political campaigns? A. I was.

Q. In any particular city?

A. In San Francisco.

Q. In what capacity?

A. I was one of the campaign managers for Mayor Rossi.

Q. Do you know a man by the name of Major Tsuneishi?

The Court: I would like to inquire what, if any, relation any of these questions and answers have to any issue in this case.

Mr. Collins: I do not know. That is the last of the questions apparently.

The Court: I hope it is. It has no place here. Proceed.

Q. Do you know a man by the name of Tsuneishi? A. Yes.

Q. Do you remember Major Tsuneishi at the Sanno Hotel in Tokyo? A. Yes.

(Deposition of Tamotsu Murayama.)

Q. What was the occasion?

A. It was an occasion to get propaganda material from American correspondents.

Q. Who was securing this propaganda material?

A. Major Tsuneishi.

Q. What happened at the Sanno Hotel on that occasion?

Mr. DeWolfe: I object to it as incompetent, irrelevant and immaterial.

The Court: Objection sustained.

(A. The American correspondents were put in separately in each room and they were ordered to write some manuscript.)

Q. Who issued that order, if you know?

Mr. DeWolfe: Same objection.

The Court: Same ruling.

(A. Major Tsuneishi.)

Q. Were any Kempei-tai around those rooms, if you know. If you don't say so?

Mr. DeWolfe: I object to it as immaterial. It has nothing to do with Radio Tokyo.

The Court: Objection sustained.

(A. I don't know.)

Q. Did you see Major Tsuneishi slap any correspondent? [3]

Mr. DeWolfe: Objected to as immaterial and incompetent.

The Court: Objection sustained.

(A. He threatened Joe Dynan, now AP correspondent in Paris.)

(Deposition of Tamotsu Murayama.)

Q. What did the threat consist of?

Mr. DeWolfe: Objected to as immaterial.

The Court: Same ruling.

(A. He was told to write an article but he refused so sternly, so Tsuneishi slapped him. He later complained he lost his tooth.)

Q. Who, when you say, he lost his tooth?

Mr. DeWolfe: Object to it as incompetent.

The Court: Objection sustained.

(A. Mr. Dynan.)

Q. Did you see Tsuneishi strike Dynan?

Mr. DeWolfe: Same objection.

The Court: Same ruling.

(A. I was standing at the end of the hall and I saw him.)

Q. Was Tsuneishi dressed in uniform on that occasion? A. Civilian clothes.

Q. Now, when the war broke out you were working for the Associated Press office in Tokyo?

A. Yes.

Q. What did you next do in your occupation?

A. I was arrested for espionage suspect.

Q. How long were you held at that time?

A. I was released immediately with the condition that I couldn't go out of Tokyo without official permission of Kempei-tai and metropolitan police force.

Q. What occupation did you follow for your livelihood at that time?

A. Mr. Sellmyer of Transocean News Agency,

(Deposition of Tamotsu Murayama.)

which was the German news agency, gave me a job.

Q. Had the Associated Press office closed?

A. Yes, that is right.

Q. How long did you work for that news agency, if you remember, approximately?

A. Until I became sick in 1943, that is, in the fall of 1943.

Q. Anything unusual happen to you when you were working at the [4] Transocean agency?

A. There was the Midway fiasco. A Kempei-tai captain invited me for tea, and as I walked out I was requested to step in a car and then driven down to Kempei-tai headquarters.

Q. What happened at the Kempei-tai headquarters when you got there?

Mr. De Wolfe: Objected to as immaterial and incompetent. It has nothing to do with the radio station whatsoever.

The Court: Objection sustained.

(A. The moment I walked into Otani's room he came up: "You are a spy. All Niseis are spy. You tip off some naval activities to America." Then he strike me down there.)

Q. How long were you in Otani's office?

Mr. DeWolfe: Same objection.

The Court: Same ruling.

(A. I'm kept there one whole day.)

Q. Were you officially released by them? By the Kempei-tai?

Mr. DeWolfe: Same objection.

(Deposition of Tamotsu Murayama.)

The Court: Objection sustained.

(A. Yes, with condition that I would not say anything about Midway.)

Q. Now, eventually you became connected with Camp Bunka? A. Yes.

Q. When, approximately?

A. Probably in December, 1943.

Q. Incidentally, were the Niseis having a hard time of it to exist in Japan during the war?

Mr. DeWolfe: I object to it as incompetent and immaterial and calling for a conclusion; too general.

The Court: Objection sustained.

(A. Yes, sir.)

Q. Did you assist other Nisei when it came to living?

Mr. DeWolfe: I object to it as immaterial and incompetent.

The Court: Objection sustained.

(A. I helped two Nisei boys and one Nisei stranded family until I became sick.)

Q. In what capacity did you report to Camp Bunka? A. As an interpreter. [5]

Q. Who was in charge of that camp, if you know?

A. Mr. Fujimura was the civilian figurehead and Mr. Tsuneishi was the executive officer.

Q. But who had the say in what was done?

A. Major Tsuneishi.

(Deposition of Tamotsu Murayama.)

Q. Incidentally, that was not called Camp Bunka at the time?

A. It was known as Surugadai Gijitsu Kenkyosho.

Q. What is the American translation of that word.

A. Surugadai, technically Institute for Research; Kenkyosho means to do some research work.

Q. Were there any prisoners of war at that institute? A. Twenty-four or five.

Q. What were those prisoners of war doing, if you know?

Mr. DeWolfe: I object to that as immaterial and incompetent.

The Court: Objection sustained.

(A. They were brought in to engage in Japanese army war propaganda.)

Q. Did these prisoners of war voluntarily do that work, if you know?

Mr. DeWolfe: Same objection.

The Court: Same ruling.

(A. No.)

Q. Why do you say that, Mr. Murayama?

Mr. DeWolfe: I object to that as incompetent.

The Court: Same ruling.

(A. First they were picked out by the Imperial Headquarters out of a prisoner of war list and they were brought in for this particular purpose.)

Q. What did these lists consist of, out of which prisoners of war were chosen?

(Deposition of Tamotsu Murayama.)

Mr. DeWolfe: I object to it as immaterial.

The Court: Objection sustained.

(A. Names, rank, talents, education, family members, and POW number.)

Q. Did you make any protest at the camp regarding the use of POWs for broadcasting purposes? [6]

Mr. DeWolfe: Same objection, if the Court please.

The Court: Objection sustained.

(A. I told Mr. Fujimura, civilian head of the POW camp I thought that this kind of radio broadcast by POW is nonsense.)

Q. What, if anything, did Mr. Fujimura do to stop it?

Mr. DeWolfe: Objected to as irrelevant and incompetent.

The Court: Objection sustained.

(A. And he agreed with me; then I submitted a copy of the international law regarding the treatment of POWs——)

Q. To whom did you submit that?

Mr. DeWolfe: Same objection, Your Honor.

The Court: Objection sustained.

(A. I submitted it to Mr. Fujimura.)

Q. Was that law ever called to Major Tsuneishi's attention, if you know?

Mr. DeWolfe: I object to it as incompetent.

The Court: Objection sustained.

(Deposition of Tamotsu Murayama.)

(A. I think Mr. Fujimura did but Major Tsuneishi didn't pay any attention, I believe.)

Q. Do you remember an occasion on December 10, 1943, when Major Tsuneishi spoke with the POWs through an interpreter? A. Yes.

Q. Tell us what was done?

Mr. DeWolfe: I object to that as incompetent, irrelevant and immaterial, having nothing to do with the issues.

The Court: Objection sustained.

(A. Major Tsuneishi said, in substance, "You are ordered to cooperate with the Japanese army to broadcast. If you fail to cooperate your life is not guaranteed.")

Q. On that occasion did he ask any of the POWs to step forward?

Mr. DeWolfe: Same objection, Your Honor.

The Court: Objection sustained.

(A. He then said: "If you refuse to cooperate, step forward.") [7]

Q. Did any prisoner of war step forward?

Mr. DeWolfe: Same objection, incompetent and irrelevant.

The Court: Same ruling.

(A. One POW by the name of Williams, British POW, stepped forward. I think he stepped two paces forward.)

Q. You were then in the courtyard when that happened?

Mr. DeWolfe: Same objection.

(Deposition of Tamotsu Murayama.)

The Court: Objection sustained.

(A. I was there.)

Q. Who interpreted Mr. Tsuneishi's speech?

Mr. DeWolfe: Same objection.

The Court: Objection sustained.

(A. Mr. Uno.)

Q. What happened to Williams?

Mr. DeWolfe: I object to that as incompetent and irrelevant. The same matter has been gone over before and sustained.

The Court: Objection sustained.

(A. Williams was taken over to the administration building. Then Tsuneishi said: "He must be killed" in the presence of Mr. Fujimura and I, myself.)

Q. And he was removed from the camp, is that correct?

Mr. DeWolfe: Same objection.

The Court: Objection sustained.

(A. That's right.)

Q. Were the prisoners of war led to believe that Williams was executed?

Mr. DeWolfe: Objected to as irrelevant and incompetent.

The Court: Objection sustained.

(A. When he was removed from the group, POW group, the boys were trembling with fear. No one could speak a word. Then they were given the impression by the time he was removed over to

(Deposition of Tamotsu Murayama.)

the administration building—they thought he was going to be executed.)

Q. Mr. Murayama, do you know an Australian Major by the name of Charles Cousens?

A. Very well. [8]

Q. When did you first see or meet Charles Cousens regardless of date? I am talking about the occasion.

A. December, 1943.

Q. Where? At Bunka camp?

A. No, around Radio Tokyo.

Q. Under what circumstances did you meet him?

A. I was at the radio station, Radio Tokyo. Then I met him in one of the rooms of Radio Tokyo. We had a meeting. I believe I saw him before that. I don't recall the exact date.

Q. What happened in that room, if you know?

A. He was ordered to write some manuscript.

Q. Did you hear the order, or did you come in after the order was given?

A. I came in after the order was given.

Q. Did Major Cousens appear to be frightened, if you know?

Mr. DeWolfe: I object to that as calling for the conclusion.

The Court: Objection sustained.

Mr. Collins: This is right within the time he was on the Zero Hour, if your Honor please.

The Court: It calls for the opinion and conclusion of the witness. Develop the facts.

(A. Very much.)

(Deposition of Tamotsu Murayama.)

Q. Describe his appearance.

A. He looked so pale with anger.

Q. Was he trembling, if you recall?

A. That I don't recall.

Q. Incidentally, another prisoner of war was removed from Camp Bunka some time later?

Mr. DeWolfe: Object to that, irrelevant, incompetent.

The Court: Objection sustained.

(A. Yes.)

Q. And you were not there when he was removed? [9]

Mr. DeWolfe: Same objection, sir.

The Court: Objection sustained.

(A. No. I was not there.)

Q. Did you arrive shortly after his removal?

Mr. DeWolfe: Objected to as immaterial.

The Court: Objection sustained.

(A. I went there on the following morning.)

Q. Who gave you the first information that Kalbfleisch had been removed from the prisoner of war camp?

Mr. DeWolfe: Object, incompetent, irrelevant and immaterial.

The Court: Objection sustained.

(A. Several POWs gathered around me with fearing looks on their faces, speaking in low voices: "Kalbfleisch was taken away last night." Wait a minute, I don't know, "last night" or "yesterday.")

(Deposition of Tamotsu Murayama.)

“We are afraid he might be killed. Please try whatever you can do.”)

Q. What did you do then?

Mr. DeWolfe: Same objection.

The Court: Same ruling.

(A. I inquired of Uno if he could find out where Kalbfleisch was taken. Then I learned he was taken over to Shinagawa POW camp. He is charged with disobedience, and every POW must be taught some lesson. He might be executed.)

Q. Then what did you do?

Mr. DeWolfe: Same objection.

The Court: Same ruling.

(A. I went to Prince Ri, Korean Prince, a Lieutenant-General, Member of the Military Counsel. I explained to him what happened so far and I also explained the international law how POW should be treated. Then he promised me he was going to do whatever he can do.)

Q. Did you discuss with him the subject of compelling prisoners of war to write script and to broadcast?

Mr. DeWolfe: Object to that as incompetent, irrelevant.

The Court: The same objection will have to be sustained.

(A. I explained to him about the radio propaganda imposed upon [10] POWs. I told him such kind of writing and radio broadcast is a joke. Then

(Deposition of Tamotsu Murayama.)

he said: "It is in the hands of Lt. Gen. Arisue."

He said: "He could interfere.")

Q. Was Major Tsuneishi directly responsible to Gen. Arisue?

Mr. DeWolfe: Object to that, incompetent, irrelevant, immaterial.

The Court: Objection sustained.

(A. POW propaganda program was introduced by Major Tsuneishi and General Arisue.)

Q. In other words, Arisue was Tsuneishi's direct superior?

Mr. DeWolfe: Same objection.

The Court: Same ruling.

(A. That's right.)

Q. And the prisoners of war thought Kalbfleisch was executed?

Mr. DeWolfe: Objected to as incompetent, irrelevant.

The Court: Objection sustained.

(A. They continually believed Kalbfleisch was executed.)

Q. Mr. Murayama, I show you a letter dated August 12, 1947, signed by Edwin Kalbfleisch, Jr. This is a copy of a letter which you handed to me, and I ask you where did that copy come from?

Mr. DeWolfe: Objected to as incompetent, irrelevant, and immaterial.

Mr. Collins: The materiality will have to appear from the letter itself, if your Honor please.

The Court: A letter?

(Deposition of Tamotsu Murayama.)

Mr. Collins: It is a letter, yes, that was to be identified. It is introduced in evidence subsequently in the deposition.

The Court: I will allow it; I will give you a record on it.

Mr. Tamba: Do you want me to read the answer.

The Court: Read the answer.

(A. This letter came from Captain Edwin Kalbfleisch to Prince Ri after he found out he was rescued without having been court martialed.)

The Court: Just a minute. Let that question and answer go out, let the jury disregard it for any purpose in this case. [11]

Q. You got that copy from Prince Ri?

Mr. DeWolfe: Objected to as incompetent, irrelevant and immaterial.

The Court: Objection sustained.

(A. Yes.)

Mr. Tamba: "I offer this letter in evidence as defendant's exhibit '1' in Murayama deposition."

Mr. DeWolfe: Objected to as incompetent, irrelevant, immaterial, not the best evidence, Kalbfleisch should appear as a witness in connection—

Mr. Collins: May I read something else? Mr. Storey, who was the attorney for the prosecution, answered to the offer, "No objection."

The Court: The objection will be sustained. Regardless of what objection was made there or whatever may have happened there, the test under the law is here that the court must rule whether this

(Deposition of Tamotsu Murayama.)

testimony is admissible to go to the jury, and the court is not bound by any matter that might have taken place in relation to this deposition. The real purpose of it is to present it here to the court, and the same rule of evidence applies as though they appeared here in court.

Mr. Collins: I am not quarreling, if your Honor please, with that.

The Court: I wanted you to know my position, so that it would be clear.

Mr. Collins: Yes. I merely point out that we are in this situation, that counsel for the prosecution then present at the taking of the deposition raised no objection whatsoever and so stated, to the introduction of that letter into evidence upon the offer by Mr. Tamba.

The Court: I am not bound by what the prosecution may or may not have done at that time and place. [12]

Mr. Collins: I understand that, your Honor, but your Honor is now making a ruling upon a present objection.

Mr. DeWolfe: I have one statement to make on that, if your Honor wants to hear me. The record in this case shows clearly, and the understanding was unequivocal and clear, entered into in writing between Mr. Collins, myself and Mr. Hennessey, that all objections would be reserved to the time of trial, and it was stated at the outset of each and

(Deposition of Tamotsu Murayama.)

every one of these depositions. There is no question about that, sir.

Mr. Collins: I realize what the stipulation was and what the Court was entered into. The only question that then arises is that here, nevertheless, despite the stipulation, Mr. Storey as counsel for the prosecution consents to its introduction in evidence.

The Court: Well, the fact that he did, this court is not bound by that.

Mr. Collins: Well, I am not trying to bind the court by it, I am simply saying that we are caught in this position.

The Court: I just want to clear it up so if I am in error you have an opportunity to correct me and so that you will have a record on it.

Mr. Collins: I would just like the record to show that, despite the fact Mr. Storey consented to its introduction in evidence, the prosecution attorneys now voice an objection to it, and your Honor is ruling upon that objection.

The Court: The objection will be sustained.

Mr. Collins: And on line 17, is that correct, Mr. Tamba?

Mr. Tamba: Yes.

Q. Did you hear repeated threats made to prisoners of war at Camp Bunka, that if they failed to cooperate, their lives would not be guaranteed?

Mr. DeWolfe: Objected to as incompetent, irrelevant.

The Court: Objection sustained.

(Deposition of Tamotsu Murayama.)

(A. Yes.) [13]

Q. Who made those threats?

Mr. DeWolfe: Object to that as incompetent, irrelevant, immaterial.

The Court: The objection will be sustained.

(A. Major Tsuneishi told prisoners of war in prisoners of war quarters, through Buddy Uno, as his interpreter.)

Q. Who was Ikeda? Did a man by the name of Ikeda work at Camp Bunka?

Mr. DeWolfe: Go ahead.

A. Yes.

Q. Did you ever hear him tell the prisoners of war the same thing? A. Yes.

Mr. DeWolfe: Objected to as incompetent, irrelevant.

The Court: Objection sustained.

Q. Let me ask you, what was the food condition at Camp Bunka like, Mr. Muriyama?

Mr. DeWolfe: Objected to as not connected with the issues of the case.

Mr. Collins: That relates directly to the question, if your Honor please, why the defendant gave food to the prisoners of war at Bunka.

The Court: Objection sustained.

(A. Food condition was terrible. That is, kao-liang, that is a Manchurian product, and soya beans were mixed in the rice and the shortage of salt, vegetables, and other vital foods was so acute, and there was continuous sickness such as beri-beri, skin

(Deposition of Tamotsu Murayama.)

eruption, falling of hair. Those boys continually complained to me so I took up the matter with the civilian head, Mr. Fujimura, and finally I took it over to Prince Ri and asked him to improve the POW camp somehow, otherwise there would be continuous sickness.)

Q. After your complaint to Prince Ri were conditions improved somehow regarding food?

Mr. DeWolfe: Same objection, your Honor.

The Court: Same ruling. [14]

(A. I brought some food myself; brought in some medicine and Mr. Fujimura and other civilians tried to improve as much as we could, nevertheless there was not much improvement, to my regret.)

Q. How about Red Cross packages? Were they delivered to the prisoners of war?

Mr. DeWolfe: Objected to as incompetent, irrelevant.

The Court: Objection sustained.

(A. I believe it was in 1944, early part of 1944, Henshaw, approached me and explained that there must be some Red Cross packages for the Allied prisoners and if there is not they wanted me to make a contact with the Swiss Diplomatic representative in Tokyo.)

Q. Did you discuss that matter with Tsuneishi or anybody?

Mr. DeWolfe: Same objection, if it please the Court.

The Court: Objection sustained.

(Deposition of Tamotsu Murayama.)

(A. I asked Mr. Fujimura to take up the matter immediately with Major Tsuneishi. Then some Red Cross packages came to Bunka Camp later.)

Q. Who brought them, do you know?

Mr. DeWolfe: Objected to as irrelevant.

The Court: Objection sustained.

(A. I think they were brought by Uno and Ikeda.)

Q. Did you do anything to afford the prisoners of war hospital treatment?

Mr. DeWolfe: Objected to as incompetent, irrelevant.

The Court: Objection sustained.

(A. Just a moment. In connection with the Red Cross packages I would like to explain a little more. They were brought over to Camp Bunka but they were kept as a prize for the men accomplishing the most work, instead of immediate distribution, whereby I severely protested for this kind of practice. I said: "These Red Cross packages belong to the prisoners of war inasmuch as sent by the Red Cross, and these packages should be delivered immediately.")

Q. Was Camp Bunka a secret POW camp?

Mr. DeWolfe: Objected to as incompetent, immaterial. [15]

The Court: Objection sustained.

(A. More or less.)

Q. Did anyone approach you and ask you to see the Swiss Consul to see if conditions could be improved?

(Deposition of Tamotsu Murayama.)

Mr. DeWolfe: Objected to as incompetent, irrelevant, immaterial.

The Court: Objection sustained.

(A. Yes, I believe it was Major Cousens mentioned about the Swiss Consul.)

Q. Did you see the Swiss Consul?

Mr. DeWolfe: Same objection, if it please the court.

The Court: Same ruling.

(A. I didn't but I took the matter up with Mr. Fujimura and I also mentioned it to Prince Ri.)

Q. Did the Swiss Consul ever investigate the camp?

Mr. DeWolfe: Objected to as immaterial, incompetent.

The Court: Objection sustained.

(A. I believe the Swiss Consul visited the camps but not Camp Bunka.)

Q. Incidentally, were your activities restricted during this time?

Mr. DeWolfe: Objected to, that is not germane to the issues, incompetent.

The Court: Objection sustained.

(A. I was under constant watch by Kempei-tai and police.)

Q. Were you able to go to see Prince Ri any time you wished or did you have to sneak out?

Mr. DeWolfe: Object to that as incompetent, immaterial.

The Court: Objection sustained.

(Deposition of Tamotsu Murayama.)

(A. More or less I have to go there secretly.)

Q. Did any of the prisoners of war protest as to the type of script they were writing, do you know?

Mr. DeWolfe: Object to that as immaterial, too general, incompetent.

The Court: Objection sustained.

(A. They continually complained that they did not want to write any [16] such war progaganda manuscript as assigned to them by Uno.)

Q. Were these protests made in writing to you?

Mr. DeWolfe: Same objection, if it please the Court.

The Court: Same ruling.

(A. Yes, there were many times secretly handed to me. They were afraid to speak to me directly.)

Q. What did you do with them?

Mr. DeWolfe: Same objection, your Honor.

The Court: Same ruling.

(A. Some of them I told to Mr. Fujimura and Mr. Matsui.)

Q. Oh, incidentally, Mr. Murayama, did you ever see anyone slap Major Cousens?

Mr. DeWolfe: Object to that as incompetent, irrelevant, and immaterial.

The Court: Objection sustained.

(A. I did.)

Q. When and where?

Mr. DeWolfe: Object to that as incompetent, irrelevant.

(Deposition of Tamotsu Murayama.)

Mr. Collins: The answer is directed to what occurred actually at Radio Tokyo, if your Honor please.

The Court: With that understanding I will allow it. If it doesn't, I will instruct the jury to disregard it.

A. I do not recall the exact date, but it was at Radio Tokyo.

Q. Who slapped him?

A. Mr. Uno was arguing somewhat with Major Cousens, then Uno slapped him. I left the room immediately, as I was standing way back in the room.

Q. Mr. Muriyama, you were very friendly to the prisoners of war, is that correct?

A. I tried to help them as much as I could.

Q. And they took you into their confidence from time to time, is that not correct.

A. I think they did.

Q. Will you tell us the circumstances under which you became very friendly with the prisoners of war? [17]

Mr. DeWolfe: I object to that as incompetent, irrelevant, immaterial .

The Court: Objection sustained.

(A. There were many instances. Once Major Cox was suffering with malaria fever. I took him to a hospital without official permission as he was suffering so much. I took other POWs to a hospital in order to relieve their suffering.)

(Deposition of Tamotsu Murayama.)

Q. Were you reprimanded for doing that without official orders?

Mr. DeWolfe: I object to that as incompetent, immaterial.

The Court: Objection sustained.

(A. Yes.)

Q. By whom, sir, if you recall?

Mr. DeWolfe: Same objection, if the court please.

The Court: Same ruling.

(A. Mr. Uno did not like me. Didn't want me, and I finally was ordered not to speak to them without the presence of other Japanese civilian members.)

Q. Did you ever talk with either Capt. Ince or Major Cousens about radio station JOAK?

Mr. DeWolfe: Go ahead.

A. Many times.

Q. What were their remarks about radio station JOAK?

Mr. DeWolfe: Objected to as hearsay, incompetent, irrelevant, immaterial.

Mr. Collins: This goes directly to the Zero Hour program, if your Honor please.

The Court: In what manner does it go directly to it?

Mr. Collins: Well, they were on the Zero Hour program at that time.

The Court: Do those questions and answers indicate it?

(Deposition of Tamotsu Murayama.)

Mr. DeWolfe: It says "Radio Tokyo," sir.

Mr. Collins: It says "Radio Tokyo."

The Court: Is the time fixed?

Mr. Collins: It is related to either Captain Ince—— [18]

The Court: If there is any question about it, I will allow it.

Mr. DeWolfe: May I point out, it was hearsay; Captain Ince——

The Court: Read the question again so it will clear it up.

Mr. Tamba: "What were the remarks about radio station JOAK?"

The Court: Read it counsel, so it will be clear.

Mr. Collins: "What were their remarks about radio station JOAK?"

Mr. DeWolfe: Objected to as hearsay, incompetent, irrelevant and immaterial.

The Court: Assuming that they did make a remark, it is hearsay, isn't it.

Mr. Collins: No, I don't think it is.

The Court: And self-serving?

Mr. Collins: No, I don't think it is self-serving at all. This is with very particular regard to the Zero Hour itself.

The Court: Assuming it was, even,——

Mr. DeWolfe: Hearsay to us, sir.

The Court: It doesn't take it out of the hearsay rule.

Mr. Collins: It is an expression about the very

(Deposition of Tamotsu Murayama.)

program itself by the persons who were conducting the program, who were on that program at a time that the defendant is actually on that program, and the statement is made to a Japanese who is in charge, at least had something to do with, two of the prisoners of war who were on that program, Muriyama had something to do with it; Muriyama had something to do with it.

The Court: However, at this time I will allow him to answer, so we will go along here and dispose of this matter.

A. They said, "Radio Tokyo is a scientific toy for the Japanese, and everything is a joke, and this program assigned to us is simply the bunk." [19]

Mr. DeWolfe: Move that that go out. They should not be allowed under legal rules of evidence to bolster up their evidence given on the witness stand by oral statement brought to the attention of the court and jury by another witness, depriving the United States of the right of confrontation; and the statements are made to them by other persons. The government's position is that it is hearsay and it should go out.

The Court: Let the answer go out and let the jury disregard it for any purpose of this case.

Q. In your opinion was it the bunk?

Mr. DeWolfe: Object to that as calling for the conclusion.

The Court: Objection sustained.

(A. It was more than a joke.)

(Deposition of Tamotsu Murayama.)

Q. Did you ever hear the prisoners of war broadcast weather reports on the radio?

Mr. DeWolfe: Object to that as incompetent, irrelevant, immaterial.

Mr. Collins: This is related to what——

The Court: Objection sustained.

Mr. Collins: ——transpired, apparently, on the Zero Hour program, with regard to Captain Ince and Major Cousens.

Mr. DeWolfe: The answers don't show anything about the Zero Hour on this deposition. I am following it down the page. If it did relate to the Zero Hour, I wouldn't object to it, but there is no showing it does, sir. There are other prisoner of war programs.

Mr. Collins: It doesn't relate to other programs, it relates to this particular program on which Captain Ince and Major Cousens were.

The Court: Read it.

Q. Did you ever hear the prisoners of war broadcast weather reports on the radio.

The Court: Objection sustained. [20]

(A. Yes.)

Q. In what way did they broadcast weather reports?

Mr. DeWolfe: Same objection.

The Court: This is the first time weather has come into these radio broadcasts, is it? Or is it?

Mr. Collins: What is that Your Honor?

(Deposition of Tamotsu Murayama.)

The Court: Is this the first time weather reports have come into it?

Mr. DeWolfe: Yes, sir.

Mr. Collins: Well, I can't say that. There is a question there. I think it is in the script, as a matter of fact. It is in there, or there is some testimony concerning what the prisoners of war were able to get in the radio script that was broadcast, and the only form in which they could obtain it. I recall there is some evidence of that.

The Court: Well, let's take it a step further. Regardless of that, what place has it in this record?

Mr. Collins: It has this much, if your Honor please, that if they were trying to put out information of benefit to the Allies, that is something which has a direct, material bearing.

The Court: Read the question again.

Q. Did you ever hear the prisoners of war broadcast weather reports on the radio?

The Court: Too general; I will sustain the objection.

(A. Yes.)

Q. In what way did they broadcast weather reports?

Mr. DeWolfe: Same objection, sir.

The Court: I will allow it. Find out what it was.

A. At the beginning of some radio programs the voice would say, "Here is another radio program from Tokyo. It is a beautiful day, it is a fine day, isn't it?" I considered it, myself, a weather broadcast.

(Deposition of Tamotsu Murayama.)

Mr. DeWolfe: Move it go out, your Honor.

The Court: I don't think it has any place in this record. However, I will let it stand, if anybody gets any comfort out of it. [21]

Q. Mr. Murayama, I hand you a document which bears no date and ask you what this, if you know?

A. This is a letter given to me by the P.O.W.s when my baby was almost dying.

Q. Is that signed by the prisoners of war in the camp? A. Yes.

Mr. DeWolfe: Object to that as immaterial, incompetent, having no bearing on the issues here.

The Court: Objection sustained.

Q. How many names on it?

Mr. DeWolfe: Same objection.

The Court: Same ruling.

(A. Eighteen names.)

Mr. Collins: "Mr. Tamba: I offer that as defendant's exhibit 2 in Murayama deposition."

May I ask you Mr. Tamba, is that exhibit 2 attached to the deposition?

Mr. Tamba: Here (indicating).

Mr. DeWolfe: Are you offering it now?

Mr. Collins: Did you see this?

Mr. DeWolfe: No. I object to it—are you offering it?

Mr. Collins: Yes, we are offering it.

Mr. DeWolfe: Object to it as incompetent, irrelevant, immaterial.

The Court: What is it?

(Deposition of Tamotsu Murayama.)

Mr. Collins: It is a letter addressed to Mr. Murayama, "Dear Mr. Murayama:" and it is signed by some 18 prisoners of war.

Mr. DeWolfe: It is a note of consolation about the child. It is a letter of consolation about the sickness of the child.

The Court: Well, that has no place here, I will sustain the objection to it.

Mr. Collins: Is that letter dated? Will you see if it bears a date there, Mr. Tamba? [22]

Mr. Tamba: I don't see any, Mr. Collins.

Mr. Collins: Yes. Do you know the page, Mr. Tamba? We are on page 14, line 20.

Mr. Tamba: Yes, I have it.

Q. Do you know a person by the name of Ken Oki?
A. Yes.

Q. How many years have you known Mr. Oki?

A. Since Sacramento days.

Q. What kind of fellow is he for telling the truth?

Mr. DeWolfe: Object to that as incompetent and not a proper method of impeachment.

The Court: Objection sustained.

(A. He is a very flexible man.)

Q. In other words, he will say anything the occasion justified, is that correct?

Mr. DeWolfe: I object to that as being incompetent, irrelevant, immaterial, leading, not proper questioning.

The Court: Objection sustained.

(Deposition of Tamotsu Murayama.)

(A. More or less.)

Q. You were accused by the heads of Bunka Camp of being too friendly with the prisoners of war?

Mr. DeWolfe: That has no bearing here, nothing germane, incompetent.

The Court: Objection sustained.

(A. I was warned many times that I was too friendly with these boys so they did not guarantee——)

Q. What did they do about you finally?

Mr. DeWolfe: I object to that as incompetent.

The Court: Objection sustained.

(A. I was kicked out.)

Q. Where did you go from Bunka?

Mr. DeWolfe: Go ahead.

A. I went to Radio Tokyo.

Q. When you were kicked out from Bunka Camp did you have occasion to see the prisoners of war again? [23]

Mr. DeWolfe: Go ahead.

A. They wanted me to come down to the broadcast so I went down there many times.

Q. And, incidentally, you were finally drafted in the Japanese Army? A. I was.

Q. When was that, Mr. Murayama?

A. June 23, 1945, I got drafted.

Q. To what work were you assigned?

A. Constructing roads.

Q. Where? A. In Nagano Prefecture.

(Deposition of Tamotsu Murayama.)

Q. And you were in the army for how long?

A. Until the termination of war.

Q. Did you volunteer. A. No, I didn't.

Q. Have you ever voted in a Japanese election? A. I did not.

Q. Have you ever held a government office in Japan? A. No.

Q. Mr. Murayama, do you recall a conversation with Major Cousens in which he indicated he wished to commit suicide?

Mr. DeWolfe: Object to that as incompetent, irrelevant, immaterial, hearsay.

The Court: Sustained.

Mr. Collins: It is preliminary, if your Honor please.

The Court: The court has ruled; the objection is sustained.

(A. Yes.)

Q. Tell us the substance of that conversation?

Mr. DeWolfe: Same objection, sir.

The Court: Same ruling.

(A. I took Major Cousens and Capt. Ince home with me, to my home, and I heard their sufferings and complaints. Then, later, when I met him at Radio Tokyo, he said: "I want to commit suicide. I cannot stand this kind of humiliation any longer." He secretly told me, asked me, if I can obtain a pistol, and I said: "Absolutely not—I cannot." [24])

(Deposition of Tamotsu Murayama.)

Q. Did he tell you how many bullets he wanted you to get?

Mr. DeWolfe: Same objection.

The Court: Objection sustained.

(A. "Just one bullet is enough to end my life." I said: "Keep your chin up. Soon the day may come, soon.")

Q. Incidentally, when you talked with the prisoners of war in Radio Tokyo, after your connection with Bunka Camp had been severed, you continually told them that the war would soon be over?

Mr. DeWolfe: Object to that as too general, incompetent, irrelevant, immaterial.

The Court: Objection sustained.

(A. I told them latest developments of the war situation from time to time. I gave them some short wave news to encourage them to keep up their vitality.)

Q. Mr. Murayama, were the prisoners of war also led to believe that Matsui had also been executed?

Mr. DeWolfe: Objected to as calling for a conclusion, incompetent, irrelevant, immaterial.

The Court: Objection sustained.

(A. P.O.W. boys continually asked me why Mr. Matsui failed to come to see them.)

Q. Were you ever called vile names by Tsuneishi and Uno and other Japanese civilians in Camp Bunka?

(Deposition of Tamotsu Murayama.)

Mr. DeWolfe: Object to that as too general, incompetent, irrelevant and immaterial.

The Court: Objection sustained.

(A. Names?)

Q. Vile names, did they ever swear at you?

Mr. DeWolfe: Same objection.

The Court: Same ruling.

(A. "Hishikari." He didn't want me to talk to the P.O.W.s.)

Q. What did he call you, bad names?

Mr. DeWolfe: Same objection, if the court please.

The Court: Objection sustained.

(A. He said he was going to remove me from the camp. Rather he was going to ask Tsuneishi to have me removed from the camp.)

Q. Oh, incidentally, referring to this defendant's exhibit 2 which I offered in evidence, I see directly to the left of the words "Yours very sincerely," two marks in a reddish color. What were those marks?

Mr. DeWolfe: Objected to because the letter didn't go in.

The Court: Objection sustained.

Mr. Collins: Is that the letter we just looked at, Mr. Tamba?

Mr. Tamba: Yes.

(A. They were the Japanese "han" or seal. One is for Mr. Uno, the other is for Ozeki. These passed censors, this letter sent to me.)

(Deposition of Tamotsu Murayama.)

Q. Did you ever tell Tsuneishi personally that the prisoners of war complained about conditions and their work at Camp Bunka, did you?

Mr. DeWolfe: I object to that as immaterial and incompetent.

The Court: Objection sustained.

(A. I told him once or twice.)

Q. What did he say to you?

Mr. DeWolfe: Objected to as incompetent, hearsay.

The Court: Objection sustained.

(A. I mentioned about the international law and he commented: "We can ignore that.")

Q. Did you ever know or see a person known as Iva D'Aquino, also known as Iva Toguri?

A. Yes.

Q. Do you know whether that person knows you?

A. I think she just knows me by sight or name.

Q. Where did you see that person?

A. I saw her at the studio, Radio Tokyo.

Q. Did you ever see her broadcast or hear her?

A. Yes, introducing their program.

Q. What was she doing? What kind of an introduction was she making? [26]

A. When I saw her she was reading for the first part of the Zero Hour manuscript for the introduction of music.

Q. What kind of music was she introducing?

A. Probably jazz music.

(Deposition of Tamotsu Murayama.)

Q. Do you recall? A. Yes.

Q. Did you ever see her in a room with Cousens? A. No, I didn't.

Q. At the radio station where script was being prepared?

A. No, I didn't see her with Major Cousens but Major Cousens told me he is working up a certain program and he gives me some scripts to read.

Q. Did he say anything about his commentaries being continuous?

A. He said he is building up commentary one after another for certain purposes.

Q. And what did you say to Cousens?

A. "Well, since you are imposed to do that work, do whatever you want."

Q. Oh, when Mr. Tsuneishi used to appear at Camp Bunka was he always wearing a little saber?

Mr. DeWolfe: Objected to as incompetent, irrelevant.

The Court: Objection sustained.

(A. Not saber. Japanese sword.)

Q. How long is that sword?

Mr. DeWolfe: Same objection, if it please the court.

The Court: Same ruling.

(A. I don't know the exact measurements, but three feet or less, something like that.)

Q. Was it customary for Japanese officers who were doing desk work to wear swords?

(Deposition of Tamotsu Murayama.)

Mr. DeWolfe: Object to as too general, incompetent.

The Court: Objection sustained.

(A. Not at their desks. They are supposed to remove the sword as soon as they enter the room.)

Q. Did the prisoners of war have swords or guns so they could protect themselves at Camp Bunka?

Mr. DeWolfe: Same objection, sir.

The Court: Same ruling.

(A. They were completely helpless, mentally and physically.)

Q. At the beginning of Camp Bunka was the script prepared by prisoners of war or someone else, if you know?

Mr. DeWolfe: Objected to as irrelevant.

The Court: Objection sustained.

(A. At the early part of the P.O.W. broadcast manuscripts were prepared by Imperial headquarters.)

Q. At the early part of the P.O.W. broadcast manuscripts were prepared by Imperial——

Mr. DeWolfe: That is the answer.

Mr. Collins: I beg your pardon.

Mr. Tamba: Line 18 is the next question, Mr. Collins.

Q. And given to the prisoners of war to broadcast?

Mr. DeWolfe: Same objection, sir.

The Court: Same ruling.

(A. That's right.)

(Deposition of Tamotsu Murayama.)

Q. Incidentally, was there a Lt. Hamamoto at Camp Bunka? A. Yes.

Q. Was he also carrying a sword at all times?

A. Always.

Mr. DeWolfe: Objected to as immaterial, move it go out.

The Court: The objection will be sustained; let it go out.

Q. Did Mr. Uno appear in uniform at Camp Bunka?

Mr. DeWolfe: Same objection.

The Court: Same ruling.

(A. Yes.)

Q. Was he likewise carrying a sword?

Mr. DeWolfe: Same objection, your Honor.

The Court: Objection sustained.

(A. Yes.) [28]

Q. At what time did the prisoners of war who were of the Catholic faith request a priest, do you know?

Mr. DeWolfe: Objected to as incompetent, irrelevant, immaterial, not germane to the issues here involved, wholly immaterial.

The Court: Objection sustained.

(A. Major Cousens approached me one day and he said: "There are many Catholic boys. They are suffering so much. I would like to help them somehow. Would you be kind enough to arrange a holy mass, confession, for these boys." Then I approached Archbishop Doi and he was so willing

(Deposition of Tamotsu Murayama.)

and happy to conduct a holy mass at the camp. Then I was forbidden to make such arrangements for these boys. It was one of the main reasons I was kicked out from the camp.)

Q. Who forbade you to make these arrangements?

Mr. DeWolfe: Same objection, Judge.

The Court: Same ruling. The objection will be sustained.

(A. Hishikari and Tsuneishi. So I bought blessed rosaries for all the Catholic boys before I left Camp Bunka. I explained to them that "I was very sorry I cannot help conduct holy mass for you but God bless you.")

Q. Mr. Murayama, prisoners of war in Camp Bunka write you now, do they not?

Mr. DeWolfe: Object to that as incompetent, irrelevant and immaterial.

The Court: Sustained.

(A. Yes, I still receive some letters from Henshaw and Capt. Kalbfleisch.)

Q. And Captain Kalbfleisch sends you gifts at Christmas, such as clothing?

Mr. DeWolfe: Objected to as immaterial.

The Court: Objection sustained.

(A. Yes, he is kind enough to send me all my needs.)

Q. Where—were there ever any girls who broadcast at Radio Tokyo, do you know, besides Miss Toguri? A. Yes, I know.

Q. Who were they, if you recall? [29]

(Deposition of Tamotsu Murayama.)

A. Ruth Hiakowa, Katherine Muroka, I forgot the other girls' first name, Fujiara, and June Suyama from British Columbia.

Q. Do you know of a single instance in Camp Bunka where any prisoners volunteered to write script or broadcast?

Mr. DeWolfe: I object to that as immaterial, not germane to the issues here, and——

The Court: The objection will be sustained.

(A. I am so familiar with the Bunka Camp condition but no one volunteered at any time. Continuously they complained to me of their physical and mental sufferings and I tried to prevent such nonsense; such war effort based upon international law, but I was helpless. I could not do anything for them. Some of them tried to please Uno and other persons at the camp but not from their bottom of heart. They really despised such broadcasts.)

Q. You had many confidential discussions with the prisoners of war?

Mr. DeWolfe: Same objection, if the court please.

The Court: Objection sustained.

(A. Yes, I had, many times.)

Q. And you would be in their rooms discussing it with them?

Mr. DeWolfe: Same objection, if it please the court.

The Court: Objection sustained.

(A. When Uno was not there.)

(Deposition of Tamotsu Murayama.)

Q. When Uno walked in, what happened?

Mr. DeWolfe: Object to it as immaterial.

The Court: Objection sustained.

(A. Everybody hushed up.)

Mr. Collins: Cross-examination.

Mr. DeWolfe: Waived, not offered.

Mr. Collins: The defendant offers the cross-examination. This is cross-examination by Mr. Storey.

(Whereupon the cross-examination was read, Mr. Collins reading the questions and Mr. Tamba the answers.) [30]

Q. Mr. Murayama, you returned from the United States to Japan in 1939?

A. The last time.

Q. You retained your American citizenship until you were drafted into the army?

A. I believe so.

Q. What date was that?

A. I got drafted in the army June 23, 1945.

Q. You considered yourself an American citizen until that time? A. Yes.

Q. What were your official duties at Camp Bunka?

Mr. DeWolfe: Objected to as immaterial.

The Court: Objection sustained.

(A. An interpreter.)

Q. Is that all you did, interpret there?

Mr. DeWolfe: Same objection.

The Court: Same ruling.

(Deposition of Tamotsu Murayama.)

(A. And, and, well, that's right, interpret.)

Q. In other words, you did not have anything to do unless some official wanted you to interpret? You didn't have anything else to do?

Mr. DeWolfe: Go ahead.

A. Well, I was given manuscript reading to do. I took down manuscripts to Radio Tokyo. That's part of my interpreter's job.

Q. Were you censoring these manuscripts?

A. I did not.

Q. Did you supervise the writing of these manuscripts?

A. Never, I never did. It was not my job at all.

Q. During the time you were at Camp Bunka, did you have any [31] official capacity with any other Japanese agency? A. No.

Q. That was the only job you occupied?

A. That's right.

Q. Did you have any official connection in any way with the Zero Hour program?

A. I had no official capacity with the Zero Hour.

Q. Approximately how many times did you observe the broadcast of the Zero Hour program?

A. I should say, many times, oh, I should say, fifteen or twenty times I dropped around the studio.

Q. That was over a period of how long?

A. It is a long time. I cannot say exactly how long. I heard the radio program when I was at the Bunka Camp. I went down there to hear it once

(Deposition of Tamotsu Murayama.)

in a while, and even after I went to Radio Tokyo I heard the program.

Q. You mentioned that there were several other girls working out at Radio Tokyo, how many of these girls participated in the Zero Hour program?

A. I know exactly, Ruth Hayakawa, Cathleen Muruka, Suyama, wait a minute. Other girls I mentioned a while ago were down the studio, but I cannot exactly say whether they participated or not. I know these girls read the manuscript.

Q. These girls you mentioned did they have regular parts on the Zero Hour each day it was broadcast?

A. I didn't see every day. I cannot say regular part each day.

Q. While you were observing the Zero Hour program did you see more than one girl participate in any Zero Hour program? A. Yes.

Q. Did you see Miss Toguri and some other girl participate at the same time and on the same program?

A. Maybe June Suyama was there. [32]

Q. Did these other girls have regular parts on the program or did they substitute for Miss Toguri from time to time?

A. No, they took parts.

Q. So they were regularly assigned and had regular parts on the Zero Hour program?

A. That's right.

(Deposition of Tamotsu Murayama.)

Q. How many girls did the Zero Hour have on one particular program?

A. I have no exact recollection.

Q. Was Miss Toguri, to your knowledge, forced to work on this Zero Hour?

A. I don't know. I cannot say because I never spoke to her.

Q. Did any Kempei Tai or policeman ever talk to you concerning Miss Toguri?

A. I don't know.

Q. You know whether they talked to you, or not.

A. Who?

Q. The Kempei Tai or the police?

A. No.

Q. Did Miss Toguri seem to be pleased with her success as radio announcer?

A. I don't know but Major Cousens said: "I have a particular aim in this program in building up this Zero Hour program."

Q. That's your answer?

A. Yes.

Q. What did Major Cousens mean by having a particular purpose in building this program up?

Mr. DeWolfe: Object to that as incompetent, calling for a conclusion.

The Court: Sustain the objection.

Mr. Collins: Your Honor sustained the objection?

The Court: Sustain the objection.

(A. I thought he meant to say a counter-espionage by building up some radio program. [33])

Q. Did you ever hear a Zero Hour program

(Deposition of Tamotsu Murayama.)

which had a double meaning or which you considered to be counter-espionage?

Mr. DeWolfe: Object to that as calling for a conclusion..

The Court: Objection sustained.

(A. I didn't pay any attention so I cannot say anything about it.)

Q. You did hear the Zero Hour program?

A. I just heard music, just part of it, and I didn't pay much attention.

Q. What was the purpose of the Zero Hour program?

A. It was aimed as Japanese army propaganda but it was in no way propaganda at all. As Cousens said, everything was a scientific toy and joke.

Q. The purpose of having the Zero Hour program from the Japanese standpoint was to broadcast propaganda?

A. Maybe the Japanese soldiers thought so but many laughed at the Zero Hour as nonsense.

Q. Who laughed at the Zero Hour program as nonsense?

Mr. DeWolfe: Object to that as calling for the opinion and conclusion, too general.

The Court: Objection sustained.

(A. Many boys and girls working at Radio Tokyo. Mostly Nisei.)

Q. Was the Zero Hour supposed to amuse and entertain the American troops?

A. I don't know.

(Deposition of Tamotsu Murayama.)

Q. Mr. Murayama, start right from the beginning of the Zero Hour programs, as you listened to it, and tell us everything that you remember about that particular program. Any program. What did it consist of?

A. Jazz, some dramatic part of it. I didn't pay much attention. I listened to jazz music, so I cannot——

Q. Then you would leave after you listened to the jazz? Then you would leave the studio?

A. That's right.

Q. That happened on all occasions when you were at the radio station listening to the Zero Hour?

A. I listened to some drama part of it but I have no recollection.

Q. Tell us about part of that drama. What was it about?

A. Now, I listened to many radio programs. It is many years ago and it is very difficult to recollect the exact type of radio drama. I remember a kind of lively atmosphere. That's about all.

Q. Is that all you can tell us about the Zero Hour? [34]

A. I didn't pay much attention.

Q. Did you ever see Miss Toguri at Camp Bunka while you were working there?

A. Never did. That is, I didn't stay always there.

Q. When would you usually see Miss Toguri around the radio station? What time of day?

(Deposition of Tamotsu Murayama.)

A. During evening. I saw her picking up radio manuscript just before the Zero Hour.

Q. What were your duties at the radio station? Why were you there?

A. News translator.

Q. While you were assigned to Camp Bunka what were you doing at Radio Tokyo?

A. I took down POW or escort boys to the radio station.

Q. Who were those boys?

A. (Witness examines defendant's exhibit "2" in his deposition.) Bucky Henshaw, Light, Newton, H. Provoo, McNaughton, Wisener, Ince, some others. It depended——

Q. What were those people doing at the radio station?

A. They broadcast as they were ordered to.

Q. What were they broadcasting?

Mr. DeWolfe: Objected to as immaterial; it is not the Zero Hour.

The Court: Unless it is the Zero Hour——

Mr. Collins: "What were these people doing at the radio station?—let's see. No, "What were they broadcasting?" This relates to some—I assume it relates to 17 persons, including Major Cousens and Captain Ince, that appear on that Exhibit 2.

Mr. Tamba: No, Ince is one of those he escorted.

The Court: The objection will be sustained. [35]

(A. First, manuscripts were prepared by the Japanese General Headquarters. They were ordered

(Deposition of Tamotsu Murayama.)

to prepare some radio dramas, some commentaries, and at the very last moment, just before the broadcast some parts were cancelled by Buddy Uno.)

Q. What were those scripts and manuscripts that you mentioned, were they propaganda?

Mr. DeWolfe: Object to that as incompetent, irrelevant.

The Court: Objection sustained.

(A. I didn't think. Some propaganda were prepared by the army, Japanese Imperial Headquarters.)

Q. Did these prisoners of war broadcast this propaganda over the air?

Mr. DeWolfe: Object to that as immaterial, incompetent, nothing to do with the Zero Hour.

The Court: Objection sustained.

(A. They were ordered to read it.)

Q. And they did read it over the air?

Mr. DeWolfe: Same objection, sir.

The Court: Objection sustained; same ruling.

Mr. Collins: I can't state definite, if your Honor please, that that relates to other programs. It well may include this program. I am not certain of that. The next sentence will show.

(A. They had to.)

Q. What time did these prisoners of war broadcast during the day?

A. Between eleven and twelve, or thereabouts.

Q. When they finished broadcasting, did you take them back to Camp Bunka?

(Deposition of Tamotsu Murayama.)

A. Yes, I did.

Q. Did you have official capacity around Radio Tokyo later in the day?

A. I took manuscripts to Radio Tokyo.

Q. You delivered manuscripts there?

A. Yes, I was ordered to take down the manuscripts sometimes.

Q. Whom did you take them to?

Mr. DeWolfe: Objected to as incompetent, irrelevant and immaterial; no reference to the Zero Hour program whatsoever, question or answer.

The Court: Objection sustained. [36]

(A. Took down to the section that, let's see. Had to take it down to the music section to prepare musics, no, wait a minute. I took all manuscripts at once and I placed on, who was it, sometimes I left it with Mr. Yamazaki, sometimes with Mr., I forget, anyway I leave there POW manuscripts.)

Q. In other words, you picked up the manuscripts prepared by the prisoners of war at Bunka Camp and delivered them to the radio station, is that correct?

Mr. DeWolfe: Same objection, if it please the Court.

The Court: Same ruling.

(A. Yes, I did.)

Q. Did you have any other official capacity for these manuscripts other than to take them down to Radio Tokyo?

(Deposition of Tamotsu Murayama.)

A. No, I didn't.

Q. Then you would return to Bunka Camp?

A. I was just hanging around Radio Tokyo rest of the day listening to music or sitting around.

Q. Did you have any regular hours at Bunka?

A. Well, my duty was to take these boys to the Radio Tokyo, so as soon as my duty is over I went down to Radio Tokyo, or went home because I was not feeling well then.

Q. While you were loafing out at the radio station they had no interpreter at Bunka? [37]

A. Well, Uno was sitting with POWs right in POW quarters where all POW were assigned to their duties; blackboard, their names and amount of work to be done so Uno, and—name by name were there so I was not needed around the camp at all, particularly around POW quarters.

Q. In other words, they had no need for your services at all in Bunka? A. No.

Q. Did they keep you out there for how long?

A. Until I was kicked out.

Q. Tell us how long in months from the time you started working at Bunka until you finished, you were kicked out?

A. December, 1943, to, it is safe to say, somewhere around January, January or February, 1945.

Q. During this period of time they kept you out there and your services were not needed whatever?

A. They needed me as an interpreter to escort

(Deposition of Tamotsu Murayama.)

these boys back and forth to Radio Tokyo and all that.

Q. Didn't you testify a minute ago that your services were not needed at all there?

A. I didn't say, "needed at all." I said that after my duty is over I did not go over to the POW quarters.

Q. Were you present when Major Tsuneishi gave orders to the prisoners of war that they must cooperate?

Mr. DeWolfe: Objected to as incompetent, irrelevant.

The Court: Objection sustained.

(A. Yes.)

Q. And he said that their lives would not be guaranteed if they did not?

Mr. DeWolfe: Same objection.

The Court: Same ruling.

(A. Yes.)

Q. And that one Williams stepped forward and said he would not cooperate?

Mr. DeWolfe: Objected to as immaterial, incompetent.

The Court: Objection sustained.

(A. Yes.)

Q. Was Williams executed?

Mr. DeWolfe: Same objection.

The Court: Same ruling.

(A. No.) [38]

(Deposition of Tamotsu Murayama.)

Q. Did you tell me in the interview here this morning that Williams was executed, and that you knew he was executed?

Mr. DeWolfe: Same objection.

The Court: Same ruling.

(A. No, I didn't say so. I think my wording was not accurate.)

Q. Didn't you tell me this morning that Major Tsuneishi said in the administration office in your presence, that Williams must be executed?

Mr. DeWolfe: Same objection.

The Court: Same ruling; the objection will be sustained.

(A. Yes he said so, but I said——)

Q. And I asked you this morning, was he executed, do you recall that?

Mr. DeWolfe: Objected to as incompetent, irrelevant.

The Court: Objection sustained.

(A. No, I didn't say it.)

Q. Do you recall my asking that question?

Mr. DeWolfe: Objected to as immaterial, incompetent.

The Court: Objection sustained.

(A. You questioned me about Williams, but I didn't say he was executed.)

Q. You didn't tell me that this morning?

Mr. DeWolfe: Same objection.

The Court: Same ruling.

(Deposition of Tamotsu Murayama.)

(A. No, I didn't say so, Mr. Storey. I think it was your misunderstanding. My inaccuracy in wording, I am sorry.)

Q. Have you talked with anyone during the noon hour concerning the execution of Williams?

Mr. DeWolfe: Objected to as immaterial, incompetent.

The Court: Objection sustained.

(A. Oh, I said to Mr. Fujimura, that——)

Q. Have you talked to anyone during the noon hour today concerning the execution of Williams?

Mr. DeWolfe: Same objection.

The Court: Same ruling.

Mr. Collins: And then this last question, this is interposed by Mr. Tamba.

Mr. Tamba: You mean statement.

Mr. Collins: That's right—statement. He wants to know did you talk to me about it this noon.

Mr. DeWolfe: Objected to as incompetent, irrelevant.

The Court: Objection sustained.

(A. Well, Mr. Tamba said: "You told Mr. Storey that Williams was executed", so I said: "No, I never did and there must be some misunderstanding", I said.)

Mr. Collins: Then the following question by Mr. Storey, continuing the questions by Mr. Storey.

Q. You have testified that you were present when Mr. Uno slapped Major Cousens in the radio station?
A. Yes.

(Deposition of Tamotsu Murayama.)

Q. Tell us about that incident?

A. I was back of the room when Uno was arguing something in an [40] angry tone with Major Cousens. Then I saw Uno slap Cousens, so I left the room immediately after that.

Q. What were they arguing about?

A. I don't know.

Q. How big was the room where they were arguing?
A. It is a very big room.

Q. You testified that they were arguing in loud voices?

A. Well, I heard angry voices. I could imagine from the tone of voice——

Q. But you cannot remember what they were arguing about?

A. No, I don't. I didn't even inquire, but Major Cousens was so angry, every time he mentions Uno's name he was holding his fists like this (witness clenches fists).

Q. Did Major Cousens clench his fists after he was slapped by Uno?

A. I left the room immediately so I don't know.

Q. How many times did he slap him?

A. Only once as far as I know.

Q. How long were you in the room during this argument?

A. I have no recollection how long I stayed there but very short time.

Q. Did you enter the room with Mr. Uno?

A. Yes I followed him, no, wait a minute, when

(Deposition of Tamotsu Murayama.)

I entered there they were arguing. That is the way I remember it.

Q. Do you recall any portion of the argument?

A. I don't

Q. And give us, approximately, the dimensions of the room you were in when this argument was taking place?

A. That room was, let's see. It is very difficult to say. About four times larger than this room (witness refers to the room in which the deposition is being taken, which was decided on by counsel was 10x20).

Q. Who occupied that office at that time? [41]

A. I think it was the Zero Hour room. I think it was the Zero Hour room.

Q. Who else was in the room at that time?

A. Three, four boys.

Q. Who were they?

A. I cannot say exactly, Mr. Mitsushio, pardon me, George Nakamoto was there.

Q. Are you sure Mr. Nakamoto was present?

A. I think he was there. I am not sure though. I recall three or four boys were there.

Q. Who else was there?

A. No, I don't recall, who was there. It was many years ago and I cannot recall every detail of every hour I have spent.

Q. Was Mrs. D'Aquino there?

A. No, I don't think so.

Q. You have given testimony to the effect that

(Deposition of Tamotsu Murayama.)

you submitted a copy of international law concerning treatment of prisoners of war to the officials of Camp Bunka?

Mr. De Wolfe: I object to that as being incompetent, irrelevant; it went out of the testimony on direct, of this witness.

The Court: Objection sustained.

(A. Yes.)

Q. Where did you get that copy?

Mr. De Wolfe: Objected to as immaterial.

The Court: Objection sustained. I suggest the jury take a recess.

(A. Out of my law books.)

(The jury left the jury box and retired for a recess. The following occurred outside the presence of the jury.)

The Court: May I inquire, Mr. Collins, how many depositions there are?

Mr. Collins: Well, I want to read one more deposition after this, Your Honor, and then I have some witnesses thereafter.

The Court: You have only one more deposition?

Mr. Collins: Yes, I have a number more, but I didn't wish—I wish to read them in a certain order.

The Court: Well, I will address my remarks now to the number that has not been read in evidence.

Mr. Collins: Oh, I have quite a few, Your Honor. I have 14 here now.

The Court: I am prepared to take those up in the absence of the jury and rule on them, so that you

(Deposition of Tamotsu Murayama.)

may have a record. We are wasting considerable time here, and it can not be justified, even under the law. However, as I have tried to indicate, I have always been very liberal in giving an opportunity to make any showing either side desired, that I thought had any relation to the issues in this case. But I might suggest that some of these depositions could be disposed of on motion in their entirety, with possibly two or three or four or five interrogatories.

Mr. Collins: I don't know.

The Court: I say that now so that you may have an opportunity to give some thought to the matter, and I might further say that it might prejudice this case either on one side or the other, this method of procedure, if I have any conception of my duty, and I don't know what is in the depositions. I don't want to prejudice them, but in the light of those depositions that have already gone in, I am afraid that we are not only wasting time, but it may prejudice your client.

Mr. Collins: Well, that is a question. I mean, if objections are going to be sustained as to certain lines of questioning, then those are matters that we could take up with the Court in the absence of the jury. That is true enough. Then if the Court sustains objections to, say, given lines,—

The Court: You will have a record.

Mr. Collins: We will have a record there. Then we can still make an offer of proof.

(Deposition of Tamotsu Murayama.)

The Court: That is all right. [43]

Mr. Collins: Of course, I think the depositions then would constitute an offer of proof, by offering them.

The Court: There is no necessity of going on with the full question and answer. In doing that, it would also protect your legal rights.

Mr. Collins: Well, I am sure that two of these—the balance of this deposition of course, we are getting close to the end of this deposition.

Mr. De Wolfe: What page?

Mr. Collins: There will be at least one more deposition.

The Court: You may take it up in the recess; if there is any way you can meet the situation I think it would be very well to consider it.

Mr. Collins: I think there is only one more deposition that will be of like character as this one. There is only one more, I am convinced of that.

The Court: I have one deposition in mind, I would have no hesitancy on a motion to dispense with the whole deposition, if I were as familiar with it as I am now, with the exception of two or three questions that may now be legally material to the issues before the Court.

Mr. Collins: Well, then, I would say this then. What we might do——

The Court: Think about it in any event, and any plans you can suggest—I had in mind that in the interests of time also, we might do this, and in

(Deposition of Tamotsu Murayama.)

the interest of not prejudicing your client one way or the other.

If I am not hearing this case, I would be hearing some other case, and it is important.

(Recess.) [44]

Mr. Collins: Page 29, Mr. Tamba, line 23:

Q. Did the prisoners of war at Camp Bunka know they had rights under international law as prisoners of war?

Mr. DeWolfe: I object to that as incompetent, irrelevant and immaterial.

The Court: Objection sustained.

(A. They knew that, so Major Cousens and the boys often requested me to help them according to the international law.)

Q. Did you personally present Major Tsuneishi with a copy of this?

Mr. DeWolfe: I object to that as incompetent, irrelevant and immaterial.

The Court: Objection sustained.

(A. I presented Tsuneishi, pardon me, Fujimura, and requested him to explain to Major Tsuneishi.)

Q. Did Fujimura present this to Major Tsuneishi?

Mr. DeWolfe: Same objection, your Honor.

The Court: Same ruling.

(A. I think he explained to Major Tsuneishi but Major Tsuneishi did not listen, so Mr. Fujimura wanted to resign as civilian head of that camp, and——)

(Deposition of Tamotsu Murayama.)

Q. Were you present during the conversation between Major Tsuneishi and Mr. Fujimura?

A. I was not there.

Q. So all you know about this is what someone else told you?

A. Mr. Fujimura told me.

Q. Mr. Murayama, shortly after war was declared, were any foreign nationals interned in Japan?

A. Pardon me?

Q. (Question repeated.)

A. Yes.

Q. Why were they interned?

A. Why?

Q. Yes.

A. I don't know. [45]

Q. Were they interned because the Japanese government thought them dangerous in their internal security, internal security of Japan?

Mr. DeWolfe: I object to that as calling for a conclusion.

The Court: Objection sustained.

(A. I didn't know the policy of the Japanese Government.)

Q. Were you interned after the outbreak of the war?

Mr. DeWolfe: I object to that as incompetent.

The Court: Objection sustained.

(A. I was not, but I was arrested, and——)

Q. How long were you held?

Mr. DeWolfe: Same objection.

The Court: Same ruling.

(A. I was detained for two days and I was ordered not to go out without official permission.)

(Deposition of Tamotsu Murayama.)

Q. Besides Major Cousens, were you ever present when any prisoner of war was slapped?

A. No.

Q. Besides Major Cousens, were you ever present when any prisoner of war was beaten in any way?

Mr. DeWolfe: I object to that as incompetent, irrelevant and immaterial.

The Court: Objection sustained.

(A. No. Some prisoners complained to me afterwards but I was not present when anyone was particularly slapped.)

Q. Did you ever see Miss Toguri give food to the prisoners of war? A. I was not present.

Q. Were you ever present when Miss Toguri gave medicine or cigarettes to the prisoners of war?

A. Some Niseis always secretly handed to them cigarettes, bread, butter, vitamin pills and other things, but I was never present when Miss Toguri brought them things. Most of the times we give them very secretly.

Mr. DeWolfe: I move that go out, Your Honor.

The Court: Objection sustained. It may go out.

Q. Was Mr. Uno still employed at Camp Bunka when you left for the army?

Mr. DeWolfe: I object to that as immaterial.

The Court: Objection sustained.

(A. I don't know whether he was there when I left or he left for Manila after I left there, I don't recall.)

(Deposition of Tamotsu Murayama.)

Q. Was Mr. Uno one of your enemies at the camp?

Mr. DeWolfe: Same objection.

The Court: Same ruling.

(A. I didn't say enemies, but I was interfering in many ways.)

Q. Do you hold any bias against Major Tsuneishi?

Mr. DeWolfe: I object to that as incompetent.

The Court: Sustained.

(A. I didn't, but I wanted to treat P.O.W.s as gentlemen, but Major Tsuneishi considered P.O.W.s more or less criminally so he thought he can order them anything he wanted to. That was the difference of the conception of prisoners of war between me and Major Tsuneishi.)

Q. Are you biased against Major Tsuneishi?

Mr. DeWolfe: No answer to that.

(Mr. Tamba: He answered that.)

Q. Mr. Murayama, have you ever written any book dealing with propaganda policy for the Japanese government?

A. I never wrote a book.

Q. Did you ever write a long treatise on propaganda for the Japanese government?

A. During the wartime I was asked to file comments on news and other things but it was not a publication or edited. Just to submit as part of my duty to the Imperial Headquarters, just mimeographed—

(Deposition of Tamotsu Murayama.)

Mr. Tamba: If there is a book or a treatise on which you are questioning the witness I demand that the witness be [47] shown the document. I want the witness to see the book or the treatise then he can answer your questions.

Mr. Storey: I think the government has the right to ask this man about the treatise——

Mr. Tamba: Show him the treatise and then you can ask him.

Q. Do you deny writing a book——

A. No, not a book.

Q. Did you prepare anything for the Japanese Government in the nature of propaganda?

A. Well, I was requested to write something on news so I write this kind of a news, and so on and so on, and I submit it as I was ordered.

Q. When did you submit it?

A. I do not recall the date.

Mr. Tamba: I now make the request again that the witness be permitted to see this treatise or book before he is asked any more questions.

Mr. Storey: It is a very simple question, Mr. Tamba.

Mr. Tamba: I again demand that the book or treatise be presented to the witness. He has the right to see any book that he is supposed to have written, if you are going to ask him any questions about it.

Mr. Storey: I offer this book in evidence as government's Exhibit "1" in Murayama deposition.

(Deposition of Tamotsu Murayama.)

(Book is shown to witness.) [48]

Q. Was it while you were working at Camp Bunka that you prepared this treatise?

A. I recall that the Niseis was ordered to perform some kind of thing. I was ordered to analyze some news so I said: "This kind of news is no good, this kind of news is all right," and I submitted it to General Headquarters, I think, but it was not——

Q. Was this prepared while you were working at Camp Bunka?

A. That's right. I recall that now, yes.

Redirect Examination

By Mr. Tamba:

Q. Is your name Ikira Namikawa?

A. My name could be read like that.

Recross-Examination

By Mr. Storey:

Q. Does your name appear on the cover of that book in Japanese characters, and I am referring to Government's Exhibit 1 in the deposition?

Mr. DeWolfe: I object to that as incompetent, irrelevant and immaterial.

The Court: Sustained.

(A. Yes (indicating Japanese characters on the cover of the exhibit). When I was arrested and beaten up Kempei tai ordered me to cooperate with the war effort, otherwise I would be thrown

(Deposition of Tamotsu Murayama.)

into prison. If anything happened I could not support my wife and children so it was part of my duty assigned to.) [49]

Q. That is your work there in front of you (indicating Government's Exhibit "1" in this deposition)?

A. I didn't say this is most of the work, but this is some work I was ordered to do.

Q. That is some of the work you were ordered to do? A. Yes.

Redirect Examination

By Mr. Tamba:

Q. Is that book all your work or other people's work?

Mr. DeWolfe: I object to that as incompetent and immaterial.

The Court: Objection sustained.

(A. English part of the book was Radio Tokyo's work, and Japanese part—I was ordered to put in my own comments and in order to help P.O.W. and other boys I had to describe some how.)

Q. After January, 1945, after you were removed from Camp Bunka, did you stay around Radio Tokyo? A. Yes.

Q. Until you were drafted? A. Yes.

Q. Counsel has offered Government's Exhibit 1, and I am turning from the left of the book toward the front (indicating Exhibit 1), where there are a number of Japanese characters. Who wrote these characters?

(Deposition of Tamotsu Murayama.)

A. I did, and it was mimeographed.

Q. Then the following pages—then I note here on page 4 there is an English translation. Who wrote that translation?

A. English was original, so Radio Tokyo broadcast.

Q. In other words, you did not translate any of the English contained in this book, is that correct?

Mr. DeWolfe: I object to that as immaterial, improper, incompetent.

The Court: Read that again, please.

(Question reread.)

The Court: I will allow it.

A. I was ordered to criticize radio propaganda and it was done. [50]

Q. And it was done in Japanese characters by you?

Mr. DeWolfe: Objected to as incompetent and immaterial.

The Court: Sustained.

(A. Yes, because I was ordered to write it.)

Q. None of these translations were your translations?

Mr. DeWolfe: I object to it as incompetent.

The Court: Objection sustained.

(A. It is not and some of the information came from army officers, Imperial Headquarters officers ordered me to write in Japanese so many parts. I

(Deposition of Tamotsu Murayama.)

wrote according to Japanese army officers' orders.)

Q. Who is Akira Namikawa?

A. Oh, Akira Namikawa, he is Information Board official who collaborated with Major Tsuneishi for all this war propaganda.

Q. This book which has been referred to as Government's Exhibit "1" has nothing to do with regard to any testimony you have given with regard to treatment of prisoners of war in Camp Bunka?

A. It has not. I risk my life to help POWs during wartime. [51]

Q. Was that written from day to day, or——

A. Well, maybe, it is a long time. It covers some time and Army officers give me Japanese notes, and say, "here, put this in, and put this in, to inspire Radio Tokyo boys in connection with your radio propaganda."

Q. Who were the Japanese army officers, if you recall?

A. I don't recall their names though, two, three officers handed me notes and I write in.

Q. What rank, if you recall, did these officers hold? A. Some captains, some majors.

Q. Did Tsuneishi ever direct you in a publication of this kind?

A. Yes, Major Tsuneishi asked me some points to be emphasized, some civilians brought in some papers, too. I compiled altogether.

(Deposition of Tamotsu Murayama.)

Recross-Examination

By Mr. Storey:

Q. These officers whom you have just mentioned called on you to advise them in their propaganda work?

A. No, they sent papers to the Bunka Camp and it was on the table—on my table—

Q. What were you supposed to do with this material when it came? A. I put together.

Q. Analyze it?

A. I took together and some Japanese parts I put in where they want.

Q. Did you make any recommendation, or advise them in any way concerning propaganda?

A. Well, I put in, "this is all right, or no good."

Mr. Collins: Was there an exhibit attached?

Mr. Tamba: There is a book exhibited.

Mr. DeWolfe: I did not understand counsel to offer this in evidence. I object to it being admitted in evidence as incompetent, irrelevant and immaterial, some book he wrote, and as having nothing to do with the issues in this case.

Mr. Collins: I have not read the book, if Your Honor please. The book seems to be in Japanese and also in English.

Can you tell me, Mr. Tamba, is there a complete translation of this Japanese attached.

Mr. Tamba: I would not know. That book was presented at the deposition by Mr. Storey. He offered it, and that is the first time I had seen it. [53]

(Deposition of Tamotsu Murayama.)

Mr. DeWolfe: If counsel is offering it, we object to it.

Mr. Collins: It was offered in evidence at the deposition itself, and if you are raising objection to it, I suggest you make your objection now.

Mr. DeWolfe: I have already objected.

The Court: The objection will be sustained. Let it go out and the jury will disregard it for any purpose of this case.

Mr. Collins: I will read the certificate that is attached to this deposition.

(Certificate read.)

/s/ TAMOTSU MURAYAMA.

Japan,

City of Tokyo,

American Consular Service—ss:

I do solemnly swear that I will truly and impartially take down in notes and faithfully transcribe the testimony of Tamotsu Murayama, a witness now to be examined. So help me God.

/s/ MILDRED MATZ.

Subscribed and sworn to before me this 9th day of May, A.D. 1949.

/s/ THOMAS W. AINSWORTH,
Vice Consul of the
United States of America.

[American Consular Service Seal.]

Service No. 834a; Tariff No. 38; No fee prescribed.

DEFENDANT'S EXHIBIT "I" IN
MURAYAMA DEPOSITION

Capt. Edwin Kalbfleish, Jr.

122 Drake Avenue

Webster Groves 19, Mo.

August 12, 1947

Dear Prince Ri:

I find this a rather difficult letter to write, Your Highness. For when one attempts to thank another for saving his life, it should be done only in person. Printed words are too impersonal to adequately convey the feeling which is behind them; only the spoken word can express the true feeling.

But since many miles separate us, I must use this method instead of the personal one.

It was only early this year that I learned through my good friend Tamotsu Murayama, that it was your intervention which prevented me from facing a firing squad or a hangman's noose. When I paced away my time in solitary confinement at Shinegawa Camp, I felt that my case was almost hopeless. However, my trust still rested in the mercy of the great God who would not allow my life to be snuffed out for having tried to help my fellow prisoners of war. And when I was marched out of that camp, I knew that He had intervened to preserve my life. I did not know how He had done it. But I was positive that my life had been spared because Murayama-san had been able to put my case before someone with great authority.

That someone was you, Your Highness. I can only say, "thank you," for I know of no other words to express more sincerely what I feel. Not only do I thank you, but also my parents and my wife thank you. For you made it possible for me to return to them and to once again enjoy family happiness.

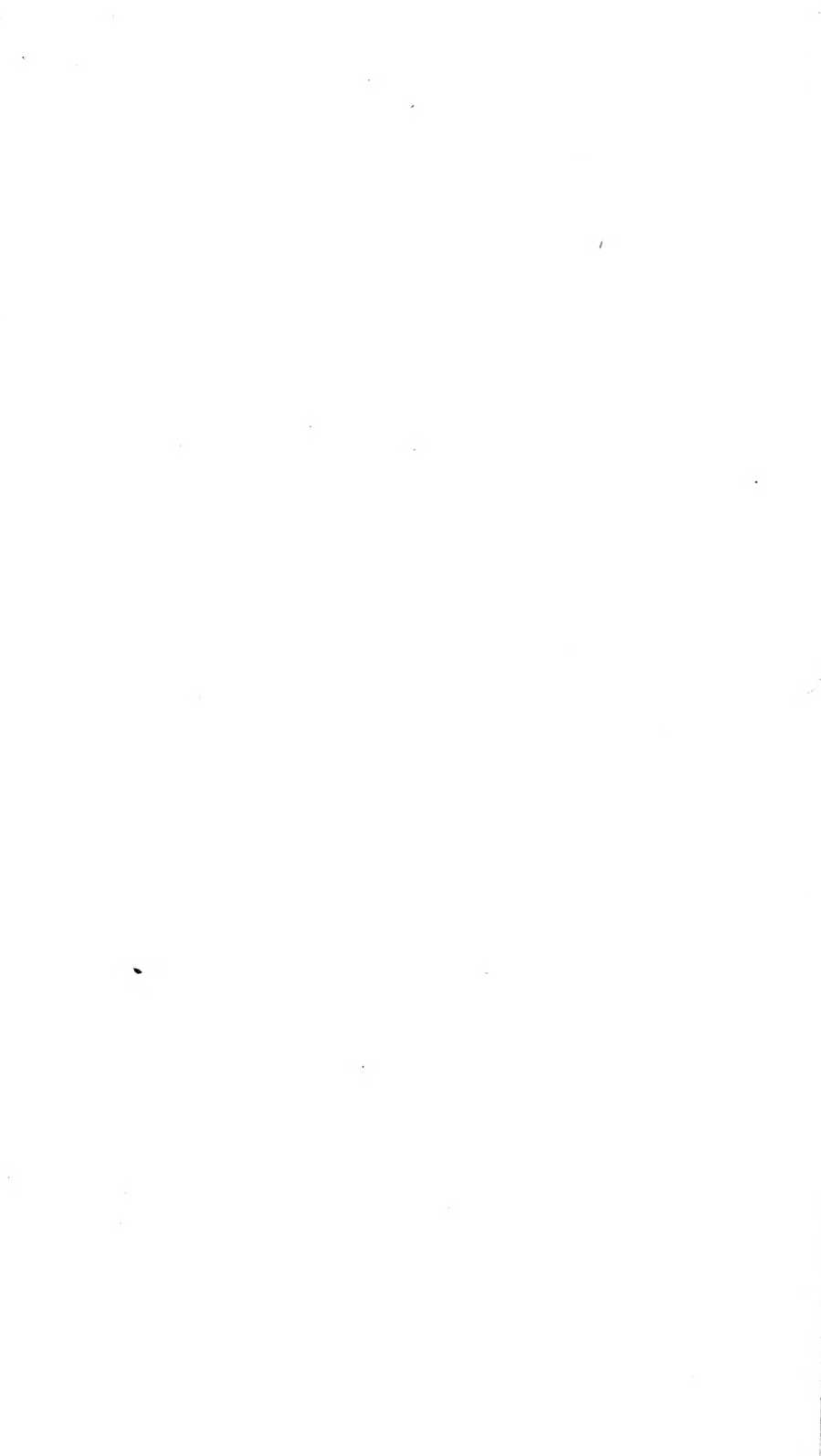
I sincerely hope that some day we may meet, and I may tell you this in person. I shall always be deeply grateful for your beneficence.

Sincerely and respectfully,

/s/ EDWIN KALBFLEISH, JR.

/s/ THOMAS W. AINSWORTH,
American Vice Consul.

[American Consular Service Seal.]





Mr. Murayama.

Dear Mr. Murayama,

We have just heard that your baby is ill, and all of us feel that we would like to help you in your moment of suffering.

If it will console you to know that there are others hoping and praying with you that your child will soon get well again, then you have that knowledge.

As we do not forget how good you have been to us in the past, we want you to know that our thoughts are with you at this moment and that we feel that the illness of your child is our concern as it is yours.

And we hope that this little note will do something to ease your sorrow and make you hope, as we hope, that your troubles will soon roll away and that in a short time your baby will be back with its father again, healthy and well, and just as it was before.

Yours very sincerely,

Kenneth C. Perkins.

Mark S. Streeter

Donald L. L. L.

Bucky H. H.

B. H.

Joseph

Stevens

W. E. J.

Harry

W. E. J.

W. E. J.

Major William M. Cox

F. Sgt. Newton H. Light.

Stephen H. S. H.

John D. Provo

Jack H. H.

W. E. J.

W. E. J.

Japan,
City of Tokyo,
American Consular Service—ss:

CERTIFICATE

I, Thomas W. Ainsworth, Vice Consul of the United States of America in and for Tokyo, Japan, duly commissioned and qualified, acting under the authority of a certain stipulation for taking oral designations abroad, and upon order of the United States District Court, made and entered March 22, 1949, in the Matter of United States of America, Plaintiff, vs. Iva Ikuko Toguri D'Aquino, Defendant, pending in the Southern Division of the United States District Court, for the Northern District of California, and at issue between United States of America vs. Iva Ikuko Toguri D'Aquino, do hereby certify that in pursuance of the aforesaid stipulation and court order and at the request of Theodore Tamba, counsel for the defendant Iva Ikuko Toguri D'Aquino I examined Tamotsu Murayama, at my office in Room 335, Mitsui Main Bank Building, Tokyo, Japan, on the ninth day of May, A.D. 1949, and that the said witness being to me personally known and known to me to be the same person named and described in the interrogatories, being by me first sworn to testify the truth, the whole truth, and nothing but the truth in answer to the several interrogatories and cross-interrogatories in the cause in which the aforesaid stipulation, court order, and request for deposition issued, his evi-

dence was taken down and transcribed under my direction by Mildred Matz, a stenographer who was by me first duly sworn truly and impartially to take down in notes and faithfully transcribe the testimony of the said witness Tamotsu Murayama, and after having been read over and corrected by him was subscribed by him in my presence; and I further certify that I am not counsel or kin to any of the parties to this cause or in any manner interested in the result thereof.

In witness whereof, I have hereunto set my hand and seal of office at Tokyo, Japan, this 19th day of May, A.D. 1949.

/s/ THOMAS W. AINSWORTH,
Vice Consul of the
United States of America.

[American Consular Service Seal]

Service No. 943; Tariff No. 38; No fee prescribed.

[Endorsed]: Filed May 23, 1949.

In the Southern Division of the United States
District Court for the Northern District of
California

No. 31712 R

UNITED STATES OF AMERICA,

Plaintiff,

vs.

IVA IKUKO TOGURI D'AQUINO,

Defendant.

DEPOSITION OF SUISEI MATSUI

Deposition of Suisei Matsui, taken before me, Thomas W. Ainsworth, Vice Consul of the United States of America, in Mitsui Main Bank Building, Room 335, in Tokyo, Japan, under the authority of a certain stipulation for taking oral designations abroad, and upon order of the United States District Court, made and entered March 22, 1949, in the Matter of the United States of America vs. Iva Ikuko Toguri D'Aquino, pending in the Southern Division of the United States District Court, for the Northern District of California, and at issue between the United States of America vs. Iva Ikuko Toguri D'Aquino.

The plaintiff, appearing by Frank J. Hennessy, United States District Attorney; Thomas DeWolfe, Special Assistant to the Attorney General, and Noel Storey, Special Assistant to the Attorney General, and the defendant, appearing by Wayne N. Collins and Theodore Tamba.

The said interrogations and answers to the wit-

ness thereto were taken stenographically by Mildred Matz and were then transcribed by her under my direction, and the said transcription being thereafter read over correctly to the said witness by me and then signed by said witness in my presence.

It is Stipulated that all objections of each of the parties hereto, including the objections to the form of the questions propounded to the witness and to the relevancy, materiality and competency thereof, and the defendant's objections to the use of the deposition, or any part of the deposition, by plaintiff, on the plaintiff's case in chief, shall be reserved to the time of trial in this cause.

SUISEI MATSUI

of Kamakura, Honshu, Japan, of lawful age, being by me duly sworn, deposes and says:

Direct Examination

By Mr. Tamba:

Q. Mr. Matsui, the name Matsui is one which you adopted for stage purposes? A. Yes.

Q. And you use that name all the time?

A. Yes.

Q. And your real name, the name you were born under is what?

A. Ioi is family name. Seiei Ioi.

Q. And Mr. Matsui, you were born in Japan?

A. Yes.

Q. And received your education in Japan?

A. Yes.

Q. What school?

A. Wasuda University.

(Deposition of Suisei Matsui.)

Q. Did you attend any school in the United States? A. A few terms in Michigan.

Q. And you have been in the United States?

A. Yes.

Q. When was the first time you came to the United States? A. That was 1925 sometime.

Q. Did you return to the United States later on?

A. Yes.

Q. When, do you recall?

A. I forget—about five or six years later.

Q. At the time of the Olympic games?

A. Yes.

Q. Were you the editor of Newsreel, a Japanese newspaper?

A. At the time when the Olympics was on I edited Asahi newsreels.

Q. Then did you return to the United States again?

A. Yes, as an actor in Paramount Studio.

Q. And you were back and forth from Japan to the United States, were you not, at that time?

A. Yes.

Q. Have you ever been in any pictures in Hollywood? A. Yes.

Q. What pictures?

A. First was "Hell and High Water." No, first one was "Paramount on Parade," and second big one was "Hell and High Water," and a couple of other short releases.

Q. What part did you take in "Paramount on Parade"?

(Deposition of Suisei Matsui.)

A. Master of ceremonies, and when the Panay incident took place I went down to Hollywood to reedit the film to pro-Japanese feelings, and Paramount called me back to reedit it pro-Japanese way.

The Court: Just a minute. The reporter is having some difficulty. Speak up.

Mr. Tamba: I am sorry, Your Honor.

(Previous answer reread by Mr. Tamba.)

Q. Mr. Matsui, did you ever take part in any radio shows? A. Yes.

Q. Did you ever take part in the Frank Watanabe radio script? A. Yes.

Q. What station?

A. KNX Station—I was the double.

Q. Eddy Holden was Frank Watanabe?

A. Yes. I am Watanabe. He is too big for Japanese, and I am his double.

Q. Now, when war broke out, Mr. Matsui, where were you?

A. I was sent by the Japanese army to Java.

Q. For what purpose?

A. To take care of the broadcasting, maybe publicity business.

Q. And you were in charge of the station there for how many years? A. About three years.

Q. Then you were recalled to Japan later on?

A. Yes.

Q. For what purpose?

A. To organize, to supervise radio programs, including prisoners program here.

(Deposition of Suisei Matsui.)

Q. Let me ask you, did you have a prisoner of war program in Batavia? A. Yes.

Q. Will you please tell us what the prisoner of war program was?

A. By army orders, in my station commentary—so I must get acquainted with the other stations, I mean enemy stations, so I started the war prisoner hour. That is mainly Red Cross purposes. Prisoners can use their own communications.

Q. In other words, it was used only for the purpose of having the prisoners broadcast messages home? A. Yes.

Q. And also to receive messages from home?

A. Yes, I get answers from prisoners' homes.

Q. I show you a document here, containing several pages, and ask you what that is?

(Counsel hands paper to witness.)

A. That was the answer, which came from the outside.

Q. To the prisoners of war there? A. Yes.

Q. And did you deliver it to the prisoners of war there?

A. Yes. It was delivered by me. My money. I paid for this copy.

Mr. Tamba:

(I offer this document in evidence as Defendant's Exhibit "1" in Matsui deposition.)

Mr. DeWolfe: Objected to as incompetent, irrelevant and immaterial.

The Court: What is it?

(Deposition of Suisei Matsui.)

Mr. Collins: It is a document. I have not seen it, Your Honor. It is attached only to the original.

Mr. Tamba: It has to do with prisoners of war messages from the Java station.

The Court: Objection sustained.

Mr. Collins: No objection.

Q. Mr. Matsui, I show you this paper and ask you what that is?

(Document handed to witness by Mr. Tamba.)

A. That is Christmas program.

Q. For American prisoners of war?

A. Yes.

Mr. Tamba:

(I offer this document in evidence as Defendant's Exhibit "2" in Matsui deposition.)

Mr. DeWolfe: Objected to incompetent, irrelevant. It is undoubtedly Java, again.

Mr. Tamba: Yes, that is correct Mr. DeWolfe.

Mr. Collins: What are they, prisoner of war messages?

Mr. Tamba: Yes, they are exchanges.

The Court: The objection will be sustained.

(Mr. Storey: No objection.)

Q. I now hand you another document and ask you if it is the same as Exhibit "1"?

(Document handed to witness by Mr. Tamba.)

A. Yes, broadcast from Australia.

(Deposition of Suisei Matsui.)

Q. And those are messages to prisoners of war?

A. Yes, at Java camp.

Q. And you delivered those messages to the prisoners of war? A. Yes.

Mr. Tamba:

(I offer this document in evidence as Defendant's Exhibit "3" in Matsui deposition.)

Mr. Storey: No objection.

Mr. DeWolfe: Objected to as incompetent, irrelevant. The message is from Australia to prisoners in Java.

Mr. Tamba: That is correct, it is still Java.

The Court: Objection sustained.

Q. I show you this document and ask you what that is?

(Document handed to witness by Mr. Tamba.)

A. This is the same. I gave the prisoners a chance to change a little and he write on the bottom.

Mr. Tamba:

(I offer this document in evidence as Defendant's Exhibit "4" in Matsui deposition.)

Mr. DeWolfe: Same objection, same kind of document.

The Court: Same ruling. The objection will be sustained.

Mr. Collins: No objection.

Q. I hand you another item and ask you what that is.

(Deposition of Suisei Matsui.)

(Counsel hands document to witness.)

A. This is so-called camp newspaper. I received it on short wave and sent down to the camp and let them read this one.

Mr. Tamba:

(I offer this document in evidence as Defendant's Exhibit "5" in Matsui deposition.)

Mr. Storey: No objection.

Mr. DeWolfe: Objected to as immaterial, a Java newspaper.

The Court: Objection sustained.

Mr. Collins: Is that what it is?

Mr. Tamba: Yes, this has reference to Java. I think with the exception—yes.

Q. I hand you a document marked March 7, 1943, and ask you what that is.

(Counsel hands document to witness.)

A. Americans broadcasting to their country.

Mr. Tamba:

(I offer this document headed March 7, 1943, as Defendant's Exhibit "6" in Matsui deposition.)

Mr. Storey: No objection.

Mr. DeWolfe: Objected to as immaterial, Java broadcasts.

The Court: Objection sustained.

Mr. Collins: Can you tell us just the nature of that question.

(Deposition of Suisei Matsui.)

Mr. Tamba: That is in reference to Java. The next one is Bunka, the next one that follows.

Q. Mr. Matsui, I hand you document dated February 27, 1943, and ask you what that is.

(Counsel hands document to witness.)

A. This is a letter that they appreciate my services for them in the camp.

Mr. Tamba:

(I offer this document in evidence as Defendant's Exhibit "7", in Matsui deposition.)

Mr. Storey: No objection.

Mr. DeWolfe: Objected to as immaterial.

The Court: Objection sustained.

Mr. Tamba: I will take it back, this is Java too.

Q. I hand you another document and ask you what it is.

(Counsel hands document to witness.)

A. This is a list of war prisoners in Java.

Mr. Tamba:

(I offer this document in evidence as Defendant's Exhibit "8", in Matsui deposition.)

Mr. Storey: No objection.

Mr. DeWolfe: Objected to as immaterial, it is Java.

The Court: Objection sustained.

Mr. Collins: Did that pertain to Java too, Mr. Tamba?

Mr. Tamba: Yes, that is right.

(Deposition of Suisei Matsui.)

Q. What became of the rest of your records, Mr. Matsui?

A. I sent that one to headquarters of Japanese army but that boat was sunk.

Q. Did you have any girls broadcasting at your station in Java? A. Yes.

Q. And did they broadcast in the English language? A. Yes, they did.

Q. What was the nationality of these girls who broadcast there?

A. Indonesian boys and girls I used. All Indonesian.

Q. You never compelled any prisoners of war to broadcast any propaganda?

A. You mean in Java or Japan?

Q. In Java? A. What do you mean?

Q. All the prisoners of war broadcast there on your station were messages to their loved ones at home? A. Yes.

Q. And you were familiar with the rules of international law for the treatment of prisoners of war? A. Yes.

Q. And you followed those rules always?

A. Yes——

Mr. DeWolfe: Objected to as incompetent, irrelevant and immaterial.

The Court: Objection sustained.

(A. Yes. The first time I even explained what I meant to all the war prisoners in the camp when they refused to write letters. Even the chaplain of the camp refused to write letter to their own coun-

(Deposition of Suisei Matsui.)

try so I told him to ask permission from the boss of the camp, and I waited for a few days. Then they came to me and accepted. They write themselves a personal letter.)

Q. In other words, all they broadcast were personal messages to their loved ones? A. Yes.

Q. Your radio station was quite popular, was it not, Mr. Matsui?

A. I think it was the best one in the whole occupied Japan. Only one station got the answer from another station, so when the Japanese general asked me to come and help the prisoners out over here——

Q. So you came to Japan, when, to take care of the Prisoner Hour? A. I forget.

Q. 1943? A. December, 1943.

Q. And where did you report for duty?

A. First time I did to the late General Matsui.

Q. Did you eventually come to Camp Bunka?

A. Yes, as soon as I came back. I met Tsuneishi in headquarters first time.

Q. Were you to be the supervisor of Camp Bunka?

A. Tsuneishi did not tell me that way. I explained I was the supervisor or something but Tsuneishi did not tell me like that way. I waiting about one months, one months and a half waiting. Then Tsuneishi called me and told me: "You go to Surugudai, Bunka Camp to help."

Q. What was Bunka Camp called?

A. We called it Bunka Camp.

(Deposition of Suisei Matsui.)

Q. Did it have any other name, Mr. Matsui?

A. Well,—

Q. What does Surugudai mean?

A. Name of the area. That was the secret station. Everybody called that station Surugudai Bunka Kaikan. Bunka camp sometimes it is called by the officers and soldiers. That was the old Bunka Gakuin School so the people thought that was institution or something like that.

Q. It was not referred to as a prisoner of war camp?

A. Nobody knows that, no. Very few people. Even officers in the army they do not know.

Q. Did you talk with Tsuneishi later about the prisoner of war program? A. Yes, I did.

Q. What was said on that occasion between you and him?

A. My information—my opinions was like this. The program which they had been doing looks like very funny to me, because they name their programs as “Hinomaru Hour,” that is Japanese flag, and “Tokyo Rose.” So I told Major Tsuneishi: “this is one thing, if you want to let them listen in better not use such Hinomaru Hour or Tokyo Rose, such things.

Q. When you talked about Tokyo Rose, you meant the Zero Hour?

A. Yes, Zero Hour. I first heard the name “Tokyo Rose” after the war.

Q. What did Tsuneishi say to you?

A. He did not give me answer.

(Deposition of Suisei Matsui.)

Q. He didn't agree with you?

A. No, only——

Q. What did you want the prisoners of war to broadcast?

A. Is my opinion that——

Q. The same as in Java?

A. Yes, same as in Java, and tell them truth at first. My opinion was tell them truths. Always tell them truths if you want them to listen.

Q. When you talked with Tsuneishi about that, who was present in the room, do you remember?

A. In headquarters, or Surugudai?

Q. In Surugudai?

A. He had me come to Surugudai. Very often he called everybody to headquarters in Ichigaya.

Q. When you talked to him about it, did you discuss it at headquarters?

A. Yes.

Q. Who was there?

A. Only Tsuneishi and me.

Q. Do you know a man by the name of Uno?

A. Yes, I know Buddy.

Q. Where did you meet him?

A. Buddy Uno, I know him very well first time I went to Paramount. He came to meet me at the station.

Q. Then did you see him at Headquarters or Bunka Camp?

A. Yes, afterwards when I went to Bunka Kaikan.

Q. Was he always wearing a uniform? And carrying a sword?

A. Yes.

(Deposition of Suisei Matsui.)

Q. Was Tsuneishi always wearing a uniform and carrying a sword?

A. Yes, but Buddy sometimes changed in civilian clothes.

Q. When you were in Java did you hear programs broadcast from Tokyo? A. I think so.

Q. How many did you hear?

A. Well, not so often. A couple of times, because I like to get Japanese commentary because we were to go with the Japanese headquarters plans because at that time communication was not so good by enemy airplanes going over and sometimes no telegrams and sometimes no letters or orders from headquarters arrived to Java so I liked to get Tokyo commentary.

Q. Did you hear women broadcasting from Tokyo at that time?

A. Not so often. A couple of times I think.

Q. Did Japan have other stations, besides Batavia and Tokyo for their broadcasting?

A. Yes, all parts of occupation area.

Q. Did you know some of the stations?

A. Singapore, Saigon, Java. In Java we have three.

Q. Would Tsuneishi let you change the program?

A. No, he did not like to have me over there.

Q. How long were you at Bunka?

A. All through, nearly a year, but actually I worked about a half year.

Q. Then what happened?

(Deposition of Suisei Matsui.)

A. Well, they sent me to Shanghai.

Q. Was that after you beat up somebody for stealing from a prisoner of war?

Mr. DeWolfe: Objected to as immaterial, incompetent.

The Court: Objection sustained.

(A. Yes.)

Q. Who?

Mr. DeWolfe: Object to that as incompetent.

The Court: Objection sustained.

(A. Buddy.)

Q. Why?

Mr. DeWolfe: Objected to as irrelevant.

The Court: Objection sustained.

(A. I don't know the first time. I don't know what happened, but I see what happened in the camp, but the rest of the time I see he hit the prisoners in the studio, and sometimes Buddy tried to steal prisoners' personal belongings so I tell him: "Give it back," and he refused, and he said: "I don't know you," he said that to me, so I tell him: "You said a mouthful," and I throw him down, and tell him to send the personal belongings back. He refused.)

Q. Where did that encounter with Buddy happen?

Mr. DeWolfe: Object to that as incompetent and immaterial.

The Court: Objection sustained.

(A. I forget the date.)

Q. I mean, where?

(Deposition of Suisei Matsui.)

Mr. DeWolfe: Object to that, incompetent, sir.

The Court: Objection sustained.

(A. In the small monitor room, what you call monitor room.)

Q. In Radio Tokyo?

Mr. DeWolfe: Same objection.

The Court: I will allow him to answer.

A. In JOAK, that is broadcasting station in Tokyo.

Q. After that you were sent to Shanghai?

Mr. DeWolfe: Object to that as immaterial.

The Court: Objection sustained.

(A. After that Tsuneishi and other officers called me up to headquarters and asked me what happened. Some of the other officers, they try to scare me, send me down to the gendarme, and finish up.)

Q. Did Tsuneishi take part in the direction of a certain moving picture, "Shoot That Flag?"

A. Yes.

Q. Whose idea was that?

A. I think it was Tsuneishi's because he planned to make the Java prisoners in a picture while I was not in Java.

Q. Did you have an argument with Tsuneishi about that picture? A. Yes, I did.

Q. What did you tell him?

A. He did not listen to me.

Q. Did you tell him it was against international law to use prisoners of war in the film?

Mr. DeWolfe: Object to that as incompetent,

(Deposition of Suisei Matsui.)

irrelevant and immaterial, talking about Java again.

The Court: Yes, objection sustained.

(A. He tried to send that film to Australia by airplane and tried to throw the film down to some part of Australia, but I stopped it.

Q. How did you stop it?

Mr. DeWolfe: Object to that for the same reason, sir.

The Court: Same ruling.

(A. I told him to stop it. I don't know whether he stopped it, or not, but, anyway, I told him to stop it.)

Q. Where was that picture made, Mr. Matsui?

Mr. DeWolfe: Same objection.

The Court: Objection sustained.

(A. It was made in Manila.)

Q. Were prisoners of war used in that picture?

Mr. DeWolfe: Object to that as irrelevant, incompetent.

The Court: Objection sustained.

(A. Many war prisoners, yes.)

Q. You had known Tsuneishi, or met him, before you came to Japan to take over Bunka Camp?

A. No.

Q. You met him?

A. I didn't know him before.

Q. Did you meet him in Sugamo or Manila?

A. Yes, once I met him in Manila. I knew him. After I joined the army I know him. Before that I don't know him.

Q. When you were in Bunka did the prisoners

(Deposition of Suisei Matsui.)

of war ever tell you they did not want to broadcast?

Mr. DeWolfe: Object to that as incompetent, irrelevant and immaterial, nothing to do with the issue of this case.

The Court: Objection sustained.

(A. Very often. They complained about writing script. They told me they did not like to take that kind of job.)

Q. Did you tell Tsuneishi that? Did you communicate that information to Tsuneishi, if you remember?

Mr. DeWolfe: Same objection, if it please the Court.

The Court: Same ruling.

(A. Well, through Mr. Fujimura.)

Q. Do you remember a blackboard at the Bunka Camp where the work was written down for the prisoners to do. A. Yes, I do.

Q. Where was that blackboard?

A. Over this desk, written on——

Mr. DeWolfe: Object to that, immaterial, incompetent.

The Court: Objection sustained.

(A. Over this desk, written on the blackboard just like for the grammar school children. "Today you must write this topic," and so and so, and Buddy sitting in the center of the chair near the wall, and he examined all scripts which came up from the prisoners.)

Q. Who started Bunka camp?

(Deposition of Suisei Matsui.)

A. I don't know.

Q. But, anyway, it was started by the time you got there?

Mr. DeWolfe: Objected to as immaterial, incompetent.

The Court: Objection sustained.

(A. Yes, but, anyway, Tsuneishi was boss of that kind of line of business. We called it, what you say, "secret mission of propaganda," or sometimes translated——)

Q. What was the Japanese translation?

Mr. DeWolfe: Object to that as immaterial, incompetent.

The Court: Objection sustained.

(A. Boryaku sen den. Sen den is "propaganda." Boryaku is "intriguish.")

Q. Mr. Matsui, were the prisoners of war well fed at Camp Bunka?

Mr. DeWolfe: Object to that as not germane to the issue here, incompetent, irrelevant, immaterial.

The Court: Objection sustained.

(A. No. They all suffer from some kind of illness.)

Q. Do you remember some of the illnesses suffered by the prisoners of war?

Mr. DeWolfe: Object to that as irrelevant and incompetent.

The Court: Same ruling, objection sustained.

(A. Some of the prisoners complained about lessened eyesight, lack of vitamin.)

(Deposition of Suisei Matsui.)

Q. Did you buy vitamins for them out of your own pocket?

Mr. DeWolfe: Objected to as incompetent, immaterial.

The Court: Objection sustained.

(A. Yes, I did, often. Some of the prisoners' hair came out; some of the prisoners complained about catching cold, like t.b.)

Q. Did some of them have boils or skin eruptions?

Mr. DeWolfe: Same objection.

The Court: Same ruling.

(A. Yes.)

Q. Were you at Camp Bunka when Tsuneishi made a speech, ordering the prisoners of war to broadcast?

Mr. DeWolfe: Object to that as immaterial.

The Court: Objection sustained.

(A. Yes.)

Q. Who was with Tsuneishi at that time?

Mr. DeWolfe: Same objection.

The Court: Same ruling.

(A. Tsuneishi and Buddy, and always Buddy translated Tsuneishi's speech.) (page 14, lines 9-10.)

Q. Was Tsuneishi rattling his sword that day?

Mr. DeWolfe: Object as immaterial.

The Court: Objection sustained.

(A. Always he carried his sword.)

Q. Did he shake it?

Mr. DeWolfe: Same objection.

(Deposition of Suisei Matsui.)

The Court: Same ruling.

(A. Holds it on top, something like that. (Witness holds his hand across his chest, as if holding something there.) He was very short-tempered, always moving around.)

Q. Do you remember what that order was like? What did he say in that order?

Mr. DeWolfe: I think that is not the best evidence, incompetent.

The Court: Objection sustained.

(A. No, when I was there, I cannot hear what they say. Anyway, Tsuneishi had a speech and Buddy translated and just a few minutes I was standing and watching, when I went to the water closet.)

Q. Did you ever tell anybody at the camp that the prisoners of war were not properly fed?

Mr. DeWolfe: Object to that as hearsay, incompetent, irrelevant, immaterial.

The Court: He told someone; objection sustained.

(A. I didn't ever say.)

Q. Did you ever report to Tsuneishi or Uno that they were not getting enough to eat?

Mr. DeWolfe: Object to that as incompetent, irrelevant, immaterial, nothing to do with the issue in this case.

The Court: Objection sustained.

(A. Well, I didn't tell them because I thought there was no use because I buy bread and beans

(Deposition of Suisei Matsui.)

and secretly I give them when they come down to the station.)

Q. Did you know Major Charles Cousens of the Australian Army? A. Well, I met him.

Q. Where did you meet him?

A. Well, I remember in Singapore, or in the Tokyo station.

Q. Under what circumstances did you meet Major Cousens in Singapore?

A. I remember by order of the headquarters.

Q. Yes, tell us about it.

A. To find out some fellow who speaks good English, and who will be reliable to read and write, and who was maybe, active in newspaper or writing, or something.

Q. And you interviewed Major Cousens?

A. Well I saw—before I came back over here to Japan, I did not know which one was selected, I was in a couple of offices, I saw them in Singapore—

Q. Anyway, you recommended Cousens?

A. Yes.

Q. Did you tell Major Cousens that he was going to be selected to broadcast? A. No.

Q. And the circumstances under which he arrived in Japan, you did not know? A. No.

Q. Do you know Iva D'Aquino, also known as Iva Toguri?

A. Well, I did not know which is which, but very often I met the girls who broadcast in the sta-

(Deposition of Suisei Matsui.)

tion when they came out from the broadcasting room.

Q. Did you ever hear the Zero Hour broadcast?

A. Not in the same room. In the other room.

Q. Did you ever see the Zero Hour broadcast?

A. No, it is quite secret. Was quite secret.

Q. But, anyway, you saw several girls come out of the room?

A. No, not same time; not same day, so I think Tokyo Rose was not the one girl.

Q. You thought there were several girls?

Mr. DeWolfe: Object to that as incompetent, calling for the conclusion.

The Court: What he thought may go out; the objection will be sustained.

(A. Several girls took her place.)

Q. Mr. Matsui, did you ever see Buddy Uno in the broadcasting station?

A. Very often. Every day.

Q. What was he doing there?

A. Every day he brought the prisoners from Bunka Camp to the station and watched what they did.

Q. Was he standing or sitting near the microphone?

A. Just close to the microphone. He sat and examined the paper word by word.

Q. Did you tell him he should not do that?

A. I told him once or twice but he did not listen anymore.

Q. What did he say?

(Deposition of Suisei Matsui.)

A. "You are not the authorized person," he told me. "What right you have?"

Q. Did he tell you who was the authorized person?

Mr. DeWolfe: Objected to as incompetent, this is not the Zero Hour program, it is another program. That stopped at 12:00 o'clock, according to the other testimony.

Mr. Collins: I don't know that is——

The Court: Same ruling.

(A. "I was ordered from Tsuneishi".)

Q. That is what he said?

Mr. DeWolfe: Objected to for the same reason.

The Court: Same ruling.

(A. Yes, "so I am boss here", he told me, so.)

Q. In other words, he told you Tsuneishi told him to do that?

Mr. DeWolfe: Objected to for the same reason.

The Court: Objection sustained.

(A. Yes. Then I told him I was ordered by higher ranking officer. I told him, but Buddy says he did not care who they are.)

Q. In other words, Tsuneishi would not let you take charge of the camp, is that correct?

Mr. DeWolfe: Object to that, incompetent, irrelevant and immaterial.

The Court: Objection sustained.

(A. No.)

Q. Did any of the prisoners of war out there voluntarily broadcast, I refer to Camp Bunka?

Mr. DeWolfe: Object to that as irrelevant, immaterial.

(Deposition of Suisei Matsui.)

The Court: Objection sustained.

A. Never. Always complained. I think I have the good proofs, the letters. That shows everybody asked me to deliver to the General to stop this. They did not like to write.)

Q. I have here some notes you gave me and ask you if that is what you are referring to? (Paper handed to witness by Mr. Tamba).

Mr. DeWolfe: Object to that irrelevant, incompetent. It has nothing to do with the Zero Hour program—prisoner of war messages.

The Court: Objection sustained.

(A. Yes, this is the prisoners' hand-writing. This is secretly handed over to me from Tamotsu Murayama.)

Mr. Tamba:

(I offer this paper, containing two messages, dated 29 February 1944 (on one sheet), signed "Bucky" Henshaw and Edwin Kalbfleish, Jr., as defendant's Exhibit "9" in Matsui deposition.)

Mr. Storey: No objection.

Mr. DeWolfe: Objected to as incompetent, irrelevant, immaterial, hearsay. Henshaw and Kalbfleisch are both here and have been subpoenaed as witnesses. Not the best evidence.

The Court: Submitted?

Mr. Collins: Yes, your Honor.

The Court: Objection sustained.

(A. I had many letters but I lost them.)

(Deposition of Suisei Matsui.)

Q. You had many letters but you no longer have them?

A. Yes, because I was not home for many years—at home. I was in Shanghai.

Q. Well, Mr. Matsui, Major Tsuneishi had considerable power regarding broadcasting of the propaganda, is that correct?

Mr. DeWolfe: Objected to as incompetent, irrelevant and immaterial.

The Court: Objection sustained.

(A. Yes, only one. He can do anything. Whatever he want, so far as the publicity is concerned, including the broadcasting, and publicity, and sign posters, and motion pictures and books. Everything what was under his influence.)

Q. Did you ever hear of the broadcast of the Shinto prayer over the radio?

Mr. DeWolfe: Objected to as incompetent, irrelevant.

The Court: Objection sustained.

(A. Yes, that was a very funny one.)

Q. Did you tell them it was very funny?

Mr. DeWolfe: Objected to as immaterial.

The Court: Objection sustained.

(A. Yes. I did not know who made that one, but I found out when they broadcast, just before American broadcast start they get out comedians like me, and Tokogawa Musesawa, and Sojin Kamian and other fellows.)

Q. What did they sound like, these prayers?

Mr. DeWolfe: Same objection, sir.

(Deposition of Suisei Matsui.)

The Court: What did they sound like? What was that?

Mr. DeWolfe: Shinto prayers.

The Court: Objection sustained. We will now take an adjournment until 10 o'clock tomorrow. The jurors may be excused.

(A. Sometime just before the American commentary started they make sound like this (witness makes wailing sounds). They thought that would scare the enemy station or let the enemy station have some interest in the coming program. Very silly thing, I thought. They found it out, I think. He said: "Not silly". Maj. Tsuncishi was crazy I think.)

Q. Mr. Matsui, do you remember when the Swiss Government asked permission to visit the prisoner of war camp?

Mr. DeWolfe: I object to that as immaterial and incompetent.

The Court: Objection sustained.

(A. Yes, I read in the Japanese paper, I remember. First time Japanese Government refused to be investigated at the camp but later on I remember I saw the Swiss Consul said everything okay.)

Q. Did that include Bunka Camp?

Mr. DeWolfe: Same objection.

The Court: Same ruling.

(A. Not included.)

Q. Why?

Mr. DeWolfe: Same objection, irrelevant.

(Deposition of Suisei Matsui.)

The Court: Objection sustained.

(A. It was a secret place.)

Q. And the Swiss did not know whether it existed?

Mr. DeWolfe: Same objection.

The Court: Same ruling.

(A. No, even that include the Swiss Consul, so he say okay, and I think some of the Japanese superiors asked them to write that to the newspaper office. They were so powerful, you cannot imagine. One of the staff officers, when we met in the newspaper office, he said he did not like to have the English sign on the glass window, so if the newspaper office take that sign off—I could let anybody to break that glass window. I think maybe one hundred or two hundred yen if I gave a gangster on the street they come to break that glass easily. This kind of thing they can easy say in that time. Everybody went crazy.)

Q. Who was Mr. Ikeda?

Mr. DeWolfe: Go ahead.

A. The son of a Marquis, or something.

Q. Was he in Camp Bunka under Tsuneishi?

A. Yes.

Q. What did he do?

Mr. DeWolfe: Object to that as immaterial.

The Court: You may indicate for the purpose of the record the purpose of the testimony.

Mr. Collins: I think his duties, what his duties were,——

The Court: Objection sustained.

(Deposition of Suisei Matsui.)

(A. Cooperate with Buddy Uno.)

Q. Incidentally, they did not like you there, the Japanese?

Mr. DeWolfe: Object to that as immaterial, too general.

The Court: Objection sustained.

(A. Ikeda and Buddy were so intimate, so everything happened in the Bunka Camp through Ikeda reported to Tsuneishi, because Buddy could not move—always stick to the camp, see.)

Q. Did Tsuneishi call you pro-American?

Mr. DeWolfe: I object to that as immaterial, incompetent.

The Court: Objection sustained.

(A. Yes.)

Q. Tsuneishi was responsible to just one general, wasn't he, Mr. Matsui?

Mr. DeWolfe: Same objection, Judge.

The Court: Same ruling.

(A. Kind of a line, so he had the superior general.)

Q. Who was that general, if you know his name?

Mr. DeWolfe: Same objection, sir.

The Court: Objection sustained.

(A. I think General Arisuya.)

Q. Tell me this, were the Japanese staff officers familiar with international law, regarding Japanese prisoners of war, that is the treatment of American prisoners of war by the Japanese?

Mr. DeWolfe: Object to that as calling for hearsay, conclusion, incompetent.

(Deposition of Suisei Matsui.)

The Court: Objection sustained.

(A. I don't think they did.)

Q. Did you ever talk with Tsuneishi about international law and the treatment of prisoners of war?

Mr. DeWolfe: Object to that, immaterial, incompetent, hearsay.

The Court: Objection sustained.

(A. Sometimes they told me they can neglect anything. "We are fighting so we can neglect anything." They did not like my international law business.)

Q. I hand you a document and ask you what that is. (Document handed to witness by Mr. Tamba.)

Mr. DeWolfe: Go ahead.

A. This is a copy of the treatment of the war prisoners.

Q. Where did you get that document?

Mr. DeWolfe: Go ahead.

A. This one I had made a copy in Java in the Batavia library.

Q. You brought that to Japan when you came to take over the supervision of Camp Bunka?

Mr. DeWolfe: Object to it as immaterial.

The Court: Objection sustained.

(A. I translated this one and sent it to headquarters here.)

Q. Headquarters in Japan?

Mr. DeWolfe: Same objection.

The Court: Same ruling.

(A. Yes, and other copies of translation I gave

(Deposition of Suisei Matsui.)

to the Java camps. There are many camps in Java. Very often in the camps they had a big argument. Every time they ask me to come down to settle. I took that copy to the Japanese officers.)

Q. So they would know what to do?

Mr. DeWolfe: Same objection, sir.

The Court: Objection sustained.

(A. Yes.)

Q. That was for camps besides Batavia?

Mr. DeWolfe: Object to that as calling for hearsay, incompetent, irrelevant, immaterial.

The Court: Objection sustained.

(A. That was in Java, not here. Here all camps under Tsuneishi's influence so I cannot do anything.

Cross-Examination

By Mr. Storey:

Mr. DeWolfe: The cross-examination is not offered by the United States.

Mr. Collins: The defendant will offer the cross-examination.

(Thereupon the cross-examination of the above-entitled deposition was read, the questions being read by Mr. Collins, the answers by Mr. Tamba.)

Q. Was the Swiss Government the protecting power for American interests in Japan during the war?

Mr. DeWolfe: Object to it as immaterial.

The Court: Objection sustained.

(Deposition of Suisei Matsui.)

(A. I think so, but I am sorry to say that, frankly, they did not work hard during the war. Not work so very much. Japanese Army too strong.)

Q. Did any prisoners of war at Camp Bunka ever request you to get in touch with their protecting power for them?

Mr. DeWolfe: Objected to as irrelevant.

The Court: Objection sustained.

(A. They are afraid to do so at the beginning.)

Q. Did they ever request you to get in touch with the Swiss Government?

Mr. DeWolfe: Objected to as hearsay, incompetent.

The Court: Objection sustained.

(A. No, they did not tell me. Just I tried to through Japanese army—let Japanese army do that. Not yet from the prisoners. War prisoners asked through me and sometime asked Mr. Maruyama and told Major Tsuneishi to find out how he can do with the Swiss Consulate.)

Q. Did you pass that information on to Tsuneishi?

Mr. DeWolfe: Object to that as incompetent, irrelevant and immaterial.

The Court: Objection sustained.

(A. Yes.)

Q. What did the prisoners ask you to do? What did they ask you to do?

(Deposition of Suisei Matsui.)

Mr. DeWolfe: Object to that as hearsay, incompetent.

The Court: Objection sustained.

(A. Send them back to the camps they belonged before.)

Q. So it had nothing to do with the protecting power?

Mr. DeWolfe: Same objection, sir.

The Court: Same ruling.

(A. No. They were so scared so they cannot tell; they cannot write this kind of letter from prisoners to me was very risky business. (Witness refers to defendant's exhibit "9.") They were so scared. Sometimes one of the prisoners disappeared. Rest of the prisoners thought he was killed or something in the camp. Even in the studio Buddy did not like to talk to the prisoners. Watched them.)

Q. Was any propaganda broadcast over your radio station in Java?

Mr. DeWolfe: Objected to as irrelevant, incompetent.

The Court: Objection sustained.

(A. Well, all propaganda was ordered from headquarters, like this way. Order come from the headquarters. That means Tsuneishi. He ordered all stations—occupied stations—this week you to this, coming week take up the Ghandi case or Mussolini case.)

Q. So propaganda was broadcast over your station in Java?

Mr. DeWolfe: Same objection, sir.

(Deposition of Suisei Matsui.)

The Court: Objection sustained.

(A. That script came from headquarters. The rest of the time we rebroadcast news and the personal letters.)

Q. From the Japanese standpoint, what was the purpose of sending these prisoners' of war messages over the air?

Mr. DeWolfe: Object to that as calling for a conclusion, incompetent, irrelevant and immaterial.

The Court: Objection sustained.

(A. The first time, if I wanted to get acquainted with the enemy station I have to give something.)

Q. In other words these prisoner of war messages were listener bait so people would listen to your station?

Mr. DeWolfe: Same objection.

The Court: Same ruling.

(A. I don't think it was bait, or something, because I like to do something to the prisoners because they were so poor. They have no way of communication, so-so, every time I tell war prisoners they can do anything. If they did not want to use my station they can——)

Q. In other words, this was a kind of a charitable practice on the part of the Japanese Government?

Mr. DeWolfe: Objected to as irrelevant, immaterial, incompetent.

The Court: Objection sustained.

(A. Not the Japanese Government idea. My own idea. Not the government. So I was sometimes

(Deposition of Suisei Matsui.)

called to headquarters by Tsuneishi and other violations for my station.)

Q. What did you mean when you said you wanted other stations to get acquainted with your station?

Mr. DeWolfe: Object to that as incompetent, irrelevant and immaterial.

The Court: Objection sustained.

(A. They refused to follow the international law and so I tried to fight against them, the Japanese authorities who refused my suggestion so I told him, "This is my hour." If they did not like it—so I explained to the prisoners: "You can use answer, but if you write against Japanese or if you talk against Japanese, maybe this practice will be stopped and I will be called," and then they cannot use it. "So, I hope you use your brain and use whatever you like." So I give that hour to the prisoners. Every script that came up to me, without reading, I give them censor's pass, and headquarters thought that was bait, something for propaganda, so-so, so, afterwards, he call me to Tokyo to co-operate with the headquarters or Radio Tokyo hour to let the other stations listen in. They wanted to use my name. I have idea may pass for the humanity sake. Everybody knows that.

When the big trouble took place in Singapore I went there and all soldiers finished this script. I have it. I used to censor the scripts in Java and give them to the prisoners to take back to their countries as souvenirs. When I went to Singapore

(Deposition of Suisei Matsui.)

from Java, I said: "This is entirely for Red Cross purposes." Some of the officers came from Java, whom I did not remember. He took out the script which I sent and he told to the other prisoners: "Mr. Matsui okay, so you can read your letters to your home.")

* * *

Q. Mr. Matsui, you have testified that Major Tsuneishi carried his sword all the time. Was a sword part of the usual uniform of a field grade officer in the Japanese army?

Mr. DeWolfe: Objected to as immaterial, incompetent, sir.

The Court: Objection sustained.

(A. It is the usual uniform for the staff officer. String on shoulder, like this (witness points to right shoulder), and sword.)

Q. Did you ever see Tsuneishi take his sword out of the case and threaten anyone with it?

Mr. DeWolfe: Objected to as too general, incompetent, irrelevant and immaterial.

The Court: Objection sustained.

(A. No, I did not. In the headquarters?)

Q. No. Remove the sword from the case?

Mr. DeWolfe: Objected to as immaterial.

The Court: Objection sustained.

(A. No, no, no.)

Q. When did you leave the radio station?

Mr. DeWolfe: Go ahead.

A. May, 1945.

(Deposition of Suisei Matsui.)

Q. Was Buddy Uno still at the Bunka Camp when you left?

Mr. DeWolfe: Same objection.

Mr. Tamba: I beg your pardon.

Mr. DeWolfe: That is all right.

The Court: Objection sustained.

(A. Yes.)

Q. And he was there all the time you were there?

Mr. DeWolfe: Objected to as immaterial.

The Court: Objection sustained.

(A. Yes.)

Q. How many months before the end of the war did you leave for Shanghai?

Mr. DeWolfe: Objected to as immaterial, sir.

The Court: Objection sustained.

(A. May the same year.)

Q. How long were you in Shanghai before the war ended?

Mr. DeWolfe: Same objection.

The Court: Same ruling.

(A. Four months. I was in an internment camp in Shanghai about a year.)

Q. After the war was over?

Mr. DeWolfe: Objected to as immaterial.

The Court: Objection sustained.

(A. After the war. Next year I came back. War finished. I was in an internees' camp.)

Q. You worked in Shanghai from May, 1945, until the war ended?

Mr. DeWolfe: Go ahead, answer it.

A. Four months.

(Deposition of Suisei Matsui.)

Q. Mr. Uno was still in Bunka camp when you left here in May, 1945?

Mr. DeWolfe: Objected to as immaterial.

The Court: Objection sustained.

(A. Yes, I saw, I heard.)

Q. Mr. Matsui, when you returned to Tokyo you were supposed to take over—to take charge of the prisoner of war program?

Mr. DeWolfe: Objected to as incompetent, irrelevant and immaterial.

The Court: Objection sustained.

(A. Here?)

Q. Yes.

Mr. DeWolfe: Object to that, improper.

The Court: Objection sustained.

(A. I think so.)

Q. Who stopped—

Mr. Collins: Withdraw that.

Q. Who stopped that?

Mr. DeWolfe: Objected to as incompetent.

The Court: Objection sustained.

(A. Tsuneishi is the big boss over here.)

Q. So as a result of that you and Major Tsuneishi became bitter enemies?

Mr. DeWolfe: Object to that as immaterial, incompetent.

The Court: Objection sustained.

(A. I think so. He never listened to me and in the beginning I think he refused to take me in the camp. So it took about two months before he gave me the certification paper.)

(Deposition of Suisei Matsui.)

(Whereupon the redirect examination of the above indicated deposition was read, Mr. Collins reading the questions and Mr. Tamba the answers.)

Redirect Examination

By Mr. Tamba:

Q. You are not mad at Tsuneishi, are you?

Mr. DeWolfe: Go ahead.

A. No. Well, a little bit I am mad.

Q. I refer to defendant's exhibit "9." I show you this (defendant's exhibit "9" is again handed to witness by counsel) was this written while you worked at the camp, in 1944?

Mr. DeWolfe: Go ahead.

A. I was—I didn't go to the camp. Murayama brought it to me.

Q. I show you a letter from Henshaw, stating "copy" (paper handed to witness by Mr. Tamba). You were away from the camp February 29, 1944?

Mr. DeWolfe: Answer it.

A. At the beginning I went to the camp and I used to meet them in the studio, but Uno did not like to have me over there.

Q. He did not like you at the camp?

Mr. DeWolfe: Objected to as irrelevant, immaterial.

The Court: Objection sustained.

(A. No.)

Q. After you came back you stayed home for a while?

(Deposition of Suisei Matsui.)

Mr. DeWolfe: Go ahead.

A. Yes.

Q. How long?

A. About half year. When I came back from Java I stayed in Japan about a year.

Mr. Collins: Now the document referred to then in question 17 on page 19 of this deposition was offered in evidence by the defense counsel without objection on the part of the prosecution, as defendant's Exhibit 10 in Matsui deposition.

Mr. Tamba: Correct.

Mr. DeWolfe: Objected to as incompetent, irrelevant, immaterial; something written in Batavia.

The Court: Objection will be sustained.

Mr. Collins: Now, I should like to read the certificate attached to the deposition of Suisei Matsui, which has been read into evidence.

(Whereupon certificate attached to above read deposition was read into the record by Mr. Collins.)

Mr. Collins: And in addition thereto, each page of the said deposition is signed at the base thereof by the deponent, Suisei Matsui.

Japan,

City of Tokyo,

American Consular Service—ss.

I do solemnly swear that I will truly and impartially take down in notes and faithfully tran-

scribe the testimony of Suisei Matsui, a witness now to be examined. So help me God.

/s/ MILDRED MATZ.

Subscribed and sworn to before me this 6th day of May, A.D. 1949.

/s/ THOMAS W. AINSWORTH,
Vice Consul of the
United States of America.

[American Consular Service Seal.]

Service No. 812a; Tariff No. 38; No fee prescribed. .

Japan,
City of Tokyo,
American Consular Service—ss.

CERTIFICATE

I, Thomas W. Ainsworth, Vice Consul of the United States of America in and for Tokyo, Japan, duly commissioned and qualified, acting under the authority of a certain stipulation for taking oral designation abroad, and upon order of the United States District Court, made and entered March 22, 1949, in the Matter of United States of America, Plaintiff, vs. Iva Ikuko Toguri D'Aquino, Defendant, pending in the Southern Division of the United States District Court, for the Northern District of California, and at issue between United States of America vs. Iva Ikuko Toguri D'Aquino, do hereby certify that in pursuance of the aforesaid stipulation and court order and at the request of Theo-

dore Tamba, counsel for the defendant Iva Ikuko Toguri D'Aquino I examined Suisei Matsui, at my office in Room 335, Mitsui Main Bank Building, Tokyo, Japan, on the sixth day of May A.D. 1949, and that the said witness being to me personally known and known to me to be the same person named and described in the interrogatories, being by me first sworn to testify the truth, the whole truth, and nothing but the truth in answer to the several interrogatories and cross-interrogatories in the cause in which the aforesaid stipulation, court order, and request for deposition issued, his evidence was taken down and transcribed under my direction by Mildred Matz, a stenographer who was by me first duly sworn truly and impartially to take down in notes and faithfully transcribe the testimony of the said witness Suisei Matsui, and after having been read over and corrected by him, was subscribed by him in my presence; and I further certify that I am not counsel or kin to any of the parties to this cause or in any manner interested in the result thereof.

In witness whereof, I have hereunto set my hand and seal of office at Tokyo, Japan, this twentieth day of May, A.D. 1949.

/s/ THOMAS W. AINSWORTH,
Vice Consul of the
United States of America.

[American Consular Service Seal.]

Service No. 951; Tariff No. 38; No fee prescribed.

[Endorsed]: Filed May 26, 1949.

In the Southern Division of the United States
District Court for the Northern District of
California

No. 31712 R

UNITED STATES OF AMERICA,

Plaintiff,

vs.

IVA IKUKO TOGURI D'AQUINO,

Defendant.

DEPOSITION OF
LESLIE SATORU NAKASHIMA

Deposition of Leslie Satoru Nakashima, taken before me, Thomas W. Ainsworth, Vice Consul of the United States of America, in Mitsui Main Bank Building, Room 335, in Tokyo, Japan, under the authority of a certain stipulation for taking oral designations abroad, and upon order of the United States District Court, made and entered March 22, 1949, in the Matter of the United States of America vs. Iva Ikuko Toguri D'Aquino, pending in the Southern Division of the United States District Court, for the Northern District of California, and at issue between the United States of America vs. Iva Ikuko Toguri D'Aquino.

The plaintiff, appearing by Frank J. Hennessy, United States District Attorney; Thomas DeWolfe, Special Assistant to the Attorney General, and Noel Storey, Special Assistant to the Attorney General,

and the defendant, appearing by Wayne N. Collins and Theodore Tamba.

The said interrogations and answers to the witness thereto were taken stenographically by Mildred Matz and were then transcribed by her under my direction, and the said transcription being thereafter read over correctly to the said witness by me and then signed by said witness in my presence.

It Is Stipulated that all objections of each of the parties hereto, including the objections to the form of the questions propounded to the witness and to the relevancy, materiality and competency thereof, and the defendant's objections to the use of the deposition, or any part of the deposition, by plaintiff, on the plaintiff's case in chief, shall be reserved to the time of trial in this cause.

LESLIE SATORU NAKASHIMA

of Tokyo, Japan, employed as United Press correspondent, of lawful age, being by me duly sworn, deposes and says:

Direct Examination

By Mr. Tamba:

Q. Mr. Nakashima, do you know a man by the name of Clark Lee? A. Yes.

Q. When and where did you first meet Mr. Lee?

A. I met Mr. Lee in about 1940.

Q. Do you know a man by the name of Brundage? A. Yes.

Q. When and where did you meet him?

(Deposition of Leslie Satoru Nakashima.)

A. Right after the Japanese surrender. When the first group of correspondents came into Tokyo.

Q. Who introduced you to Mr Brundage?

A. Clark Lee.

Q. Do you know Mr. Brundage's first name?

A. I don't remember now what his first name is.

Q. Were Mr. Brundage and Mr. Lee in Japan, or in Tokyo, prior to the entry of American troops, if you recall?

A. Well, I don't remember the two being here together. Mr. Lee [2*] was here before the war as an AP correspondent, but I don't remember Mr. Brundage.

Q. What was the occasion of your meeting with these two gentlemen after the surrender?

A. Why, Lee wanted to get hold of Tokyo Rose. He said here was a big story and liked me to help him get it.

Q. And you offered to help, to assist them in getting so-called Tokyo Rose? A. Yes.

Q. What did you then do?

A. So I went over to—I had heard about Tokyo Rose but I did not know who Tokyo Rose was so I went over to Radio Tokyo to find out and in the confusion right after the termination of the war there were several boys there and Ken Oki was there, whom I had known.

Q. Did you speak to Ken Oki?

A. Yes, I asked him who Tokyo Rose was.

* Page numbering appearing at bottom of page of original Reporter's Transcript.

(Deposition of Leslie Satoru Nakashima.)

Q. What did he tell you?

A. He said as far as they were concerned they had no Tokyo Rose. They never introduced any person as Tokyo Rose on their program and by program he was referring to what he called the Zero Hour program and there were five or six other girls on the program.

Q. Did he give you the name of Mrs. D'Aquino?

A. No. I asked him to get some of the girls and he gave me the name of Iva Toguri.

Q. What did you next do, Mr. Nakashima?

A. So I told Clark Lee that Radio Tokyo had told me that there was no single girl by the name of Tokyo Rose, that there were five or six girls, and how about it.

Q. What did Lee tell you, or Brundage?

A. Well, Lee did not give me any immediate answer. He told me he would think about it and later on, I don't know how many [3] hours elapsed, either he called me or I called him back, I don't remember, but he told me to go ahead and get Iva Toguri anyway and to offer her two thousand dollars for an exclusive story.

Q. Did you meet Iva Toguri after that?

A. No, I didn't even know where Toguri was living, Mrs. D'Aquino was living, but I knew her husband was working for Domei News and I inquired at Domei for his address, so I went over there early the next morning to D'Aquino's house.

Q. Did you meet Mrs. D'Aquino there?

(Deposition of Leslie Satoru Nakashima.)

A. Yes, she was home with her husband.

Q. What was said by you and what was said by her, if anything, at that time?

A. I told her that all the correspondents were very anxious to get hold of Tokyo Rose; that she was a big story, and she told me then that she was not Tokyo Rose; that there were other girls on the program, and I remember I told her the correspondents would come after her anyway and that it would be to her advantage to give the story to Cosmopolitan Magazine and make some money, I said, and I think her husband told her at the time that it might be a good idea to give an exclusive story because that would prevent her from being bothered by the other correspondents. That the other correspondents might not be so interested if she gave an exclusive story to the Cosmopolitan Magazine.

Q. What did you do then after you talked with Mrs. D'Aquino?

A. So I suggested that we all go to the Imperial Hotel where Clark Lee and Brundage were.

Q. So you went into his room at the Tokyo Hotel——

A. They invited me to this room on the second floor of the Imperial.

Q. Do you recall Mrs. D'Aquino telling both Brundage and Lee that she was not the only girl on the program?

A. I remember. Right at the outset she said she was not Tokyo [4] Rose; that there were other girls

(Deposition of Leslie Satoru Nakashima.)

on the program, and then a long interview followed.

Q. You did not remain continually in the room?

A. I was there maybe for a half hour.

Q. Then you left? A. Yes.

Q. Incidentally, some contract was prepared up there in the room? A. Yes.

Q. You were a witness to that contract?

A. Yes.

Q. You do not recall at this time what was in that contract, or do you?

A. Well, I don't remember the full details of the contract but she might have said that she was the only Tokyo Rose on the program.

Q. In the contract?

A. In the contract she might have. She signed a contract and the witnesses were her husband and myself.

Q. Before giving this testimony you talked with Mr. Noel Storey, did you not? A. Yes.

Q. Did he show you a contract? A. No.

Q. However, you recall that was the first thing she told Brundage and Clark, that she was not the only girl——

A. Yes, she said right at the outset she was not the only girl on the program.

Q. Did you have occasion to see Brundage a day or two following this interview?

Mr. DeWolfe: I object to that question and the following answer on the grounds that it is hearsay.

The Court: Objection sustained.

(Deposition of Leslie Satoru Nakashima.)

(A. He told me later that the whole thing was spoiled because she broke the contract by giving a mass interview to all the correspondents in Yokohama.)

Q. Mr. Nakashima, you have had occasion to interview Mrs. Toguri, [5] or D'Aquino several times since this date that you have just testified to?

A. Yes.

Q. Under what circumstances, will you tell us?

A. These were occasions when stories appeared in our cables from the States and we had to get local reaction from the person herself so I went over to interview her on two or three occasions. Two occasions I remember.

Q. What, if anything, in substance, did she tell you on this occasion—these occasions?

A. The first time I went there was when a story came over the wire that the Justice Department in Washington would take action against her for treason and she told me at that time that she would welcome a trial any time anywhere because she believed that she had committed no act of treason against the United States in that she had not prepared any script, and she said she had been in Sugamo Prison for a whole year and the FBI had ample opportunity to check her, investigate her, and had released her, and by that action she believed she had been given a clean bill of health.

Q. Did she tell you about anyone coaching her?

A. Yes, she said that—this she said at this interview, with Clark Lee at the hotel, that Major Cou-

(Deposition of Leslie Satoru Nakashima.)

sens had liked her voice and had coached her in broadcasting.

Q. Did she ever make a statement to you at any time or any place to the effect that she wanted a speedy trial before she lost contact with all of her witnesses, if you recall?

A. She said she wanted a speedy trial, but as far as about her fear of losing contact with witnesses, I don't remember.

Q. Incidentally, you were in Japan during the war, were you not, Mr. Nakashima?

A. Yes. [6]

Q. And you are a Nisei? A. Yes.

Q. And you are now a citizen and national of Japan, is that correct?

A. Yes, technically I am.

Q. Under what circumstances did you change your citizenship?

Mr. DeWolfe: Objected to as incompetent, irrelevant, and immaterial. There is a long answer about a page long.

The Court: Objection sustained.

(A. Well, when the war broke out I was an American without dual citizenship. Many Japanese with dual citizenship are considered Japanese subjects on Japanese soil, as far as the Japanese government is concerned; they did not consider the American side of it at all, but years before I had—while I was living in Hawaii I had expatriated myself from Japanese citizenship; originally I had

(Deposition of Leslie Satoru Nakashima.)

dual citizenship but I had expatriated myself from Japanese citizenship; there was a drive on in Hawaii at that time. They wanted all American-Japanese to be so-called one hundred per cent American and in the eyes of the Japanese government I was an American, and I had to register with the police for a residential permit over here; when the war broke out I was thrown in a very embarrassing position. Personally, I thought I—that they would come and intern me, but after searching my house they decided not to intern me and the police who had been in my district, making periodic rounds there before the war, advised me to get out Japanese citizenship because I might be thrown into prison and get into difficulties; also my wife was sick with tuberculosis and was in a sanitarium and I had a daughter two years old and another one only ten months old and I was their sole means of support, and since June, when the Japanese froze American assets I had not been getting any salary from New York, and I had a very tough time, and I could not get to see my bureau chief, the UP bureau chief, because he was interned and I had to begin looking for a job and the first thing I did was try to reduce expenses and I went to the sanitarium and transferred my wife from a first class to a third class [7] room and in December and January I tried to get jobs but nobody would give me a job because I was an American and I finally got a job with Domei News Agency in February,

(Deposition of Leslie Satoru Nakashima.)

after I had made application for so-called restoration of Japanese citizenship. They called it "family record." It is not called citizenship or anything like that. It is called "family record," and many Japanese firms require that to give employment.)

Q. Did you Niseis have a pretty hard time during the war?

Mr. DeWolfe: Objected to as incompetent, irrelevant, and immaterial, too general.

The Court: Objection sustained.

(A. Even after I had taken out Japanese citizenship the gendarme and thought police were after me all throughout the war.)

Q. You had a pretty difficult time all of you American-born Japanese, did you not, during the war?

Mr. DeWolfe: Same objection.

The Court: Same ruling.

(I certainly did. I had to go out and plead with the farmers to sell me food. It would be fantastic if I had to tell all the things we did.)

Cross-Examination

By Mr. Storey:

Q. When did you first meet the defendant?

A. That morning.

Q. Give us the date as closely as you can?

A. It must have been early in September of 1945.

Q. That was after the war was over?

(Deposition of Leslie Satoru Nakashima.)

A. Yes, when the first group of correspondents came in. The first plane came to Atsugi and the former correspondents who had been in Tokyo just disregarded orders. They just caught the electric train from Yokohama and came swarming into Tokyo, and I renewed my friendship with quite a few of the correspondents I had known.

Q. You had never heard of Iva Toguri prior to the time you talked with Lee?

A. I had heard at Domei where I worked that she was one of the—no, I had heard that she was—let's see now. I knew she worked for Domei listening post. The Domei had listening posts [8] for foreign broadcasts and she was one of the employees listening to the foreign broadcasts and transcribed them.

Q. Did you or didn't you know anything about what she did until after the war was over?

A. No.

Q. When you talked with Mr. Oki and asked who was known as Tokyo Rose——

A. I didn't say that. I asked for Tokyo Rose, simply.

Q. And who did he tell you Tokyo Rose was?

A. Well, he said that on the Zero Hour they never admitted having a Tokyo Rose and that they had never introduced any person as Tokyo Rose, but that they had five or six girls on the program.

Q. Did he give you the names of the other girls?

(Deposition of Leslie Satoru Nakashima.)

A. No. I asked him for names and he gave me Iva Toguri.

Q. That is the only one he gave you?

A. Yes, the only one.

Q. And that is the only checking you did to find Tokyo Rose?

A. That is all I did. I explained to Lee that there were five or six girls.

Q. Did you contact anyone but Miss Toguri?

A. No, I didn't.

Q. Approximately how long did you stay in the room with Mr. Lee and Mr. Brundage?

A. About one-half hour only.

Q. Was that the only time you were ever present when Miss Toguri was being interviewed by Lee and Brundage?

A. Yes.

Q. Did you sign this contract as a witness or did your name just appear on this paper.

A. I think I signed it.

Q. Don't you know? Did you or didn't you sign it?

A. Yes, I signed it. [9]

Redirect Examination

By Mr. Tamba:

Q. While you were present in the Imperial Hotel was she offered a check by Brundage?

A. Yes, but she refused to take it. She said she didn't want it.

/s/ LESLIE NAKASHIMA.

Japan,
City of Tokyo,
American Consular Service—ss.

I do solemnly swear that I will truly and impartially take down in notes and faithfully transcribe the testimony of Leslie Satoru Nakashima, a witness now to be examined. So help me, God.

/s/ MILDRED MATZ.

Subscribed and sworn to before me this 2nd day of May, A.D. 1949.

/s/ THOMAS W. AINSWORTH,
Vice Consul of the United
States of America.

[American Consular Service Seal.]

Service No. 732a; Tariff No. 38; No fee prescribed.

Japan,
City of Tokyo,
American Consular Service—ss.

CERTIFICATE

I, Thomas W. Ainsworth, Vice Consul of the United States of America in and for Tokyo, Japan, duly commissioned and qualified, acting under the authority of a certain stipulation for taking oral designations abroad, and upon order of the United States District Court, made and entered March 22, 1949, in the Matter of United States of America, Plaintiff, vs. Iva Ikuko Toguri D'Aquino, Defendant, pending in the Southern Division of the United States District Court, for the Northern District of California, and at issue between United States of

America vs. Iva Ikuko Toguri D'Aquino, do hereby certify that in pursuance of the aforesaid stipulation and court order and at the request of Theodore Tamba, counsel for the defendant Iva Ikuko Toguri D'Aquino I examined Leslie Satoru Nakashima, at my office in Room 335, Mitsui Main Bank Building, Tokyo, Japan, on the second day of May, A.D. 1949, and that the said witness being to me personally known and known to me to be the same person named and described in the interrogatories, being by me first sworn to testify the truth, the whole truth, and nothing but the truth in answer to the several interrogatories and cross-interrogatories in the cause in which the aforesaid stipulation, court order, and request for deposition issued, his evidence was taken down and transcribed under my direction by Mildred Matz, a stenographer who was by me first duly sworn truly and impartially to take down in notes and faithfully transcribe the testimony of the said witness Leslie Satoru Nakashima; and I further examined the said witness Leslie Satoru Nakashima at my office in the Mitsui Main Bank Building, Tokyo, Japan, on the twelfth day of May, A.D. 1949, at the request of the aforesaid Theodore Tamba, counsel for the defendant, and upon proper notice given in my presence by the said Theodore Tamba, counsel for the defendant, to Noel Storey, Special Assistant to the Attorney General, appearing for the plaintiff, on the second day of May, A.D. 1949; and the said Noel Storey having due notice that the counsel for the defendant desired to put to the witness Leslie Sa-

toru Nakashima the question appearing in lines 2 and 3 on page 10 of the attached transcript of the deposition of Leslie Satoru Nakashima, thereafter not appearing at the time of the further examination of the said witness Leslie Satoru Nakashima on the twelfth day of May, A.D. 1949; and the said witness, being by me first sworn to testify the truth, the whole truth, and nothing but the truth in answer to the further interrogatory of which notice had been duly given, his evidence was taken down and transcribed under my direction by Martha Vaughan Winn, a stenographer, who was by me first duly sworn truly and impartially to take down in notes and faithfully transcribe the further testimony of the said witness Leslie Satoru Nakashima; and the transcript of the evidence of the said witness, including the evidence given at the time of the further examination on the twelfth day of May, A.D. 1949, having been read over and corrected by him, was subscribed by him in my presence; and I further certify that I am not counsel or kin to any of the parties to this cause or in any manner interested in the result thereof.

In witness whereof, I have hereunto set my hand and seal of office at Tokyo, Japan, this 16th day of May, A.D. 1949.

/s/ THOMAS W. AINSWORTH,
Vice Consul of the United
States of America.

[American Consular Service Seal.]

Service No. 899; Tariff No. 38; No fee prescribed.

[Endorsed]: Filed May 21, 1949.

In the Southern Division of the United States
District Court for the Northern Division of
California

No. 31712 R

UNITED STATES OF AMERICA,

Plaintiff,

vs.

IVA IKUKO TOGURI D'AQUINO,

Defendant.

DEPOSITION OF TOSHIKATSU KODAIRA

Deposition of Toshikatsu Kodaira, taken before me, Thomas W. Ainsworth, Vice Consul of the United States of America, in Mitsui Main Bank Building, Room 335, in Tokyo, Japan, under the authority of a certain stipulation for taking oral designations abroad, and upon order of the United States District Court, made and entered March 22, 1949, in the Matter of the United States of America, vs. Iva Ikuko Toguri D'Aquino, pending in the Southern Division of the United States District Court, for the Northern District of California, and at issue between the United States of America vs. Iva Ikuko Toguri D'Aquino.

The plaintiff, appearing by Frank J. Hennessy, United States District Attorney; Thomas DeWolfe, Special Assistant to the Attorney General, and Noel Storey, Special Assistant to the Attorney General, and the defendant, appearing by Wayne N. Collins and Theodore Tamba.

The said interrogations and answers to the witness thereto was taken stenographically by Mildred Matz and were then transcribed by her under my direction, and the said transcription being thereafter read over correctly to the said witness by me and then signed by said witness in my presence.

It is Stipulated that all objections of each of the parties hereto, including the objections to the form of the questions propounded to the witness and to the relevancy, materiality and competency thereof, and the defendant's objections to the use of the deposition, or any part of the deposition, by plaintiff, on the plaintiff's case in chief, shall be reserved to the time of trial in this case.

TOSHIKATSU KODAIRA

of Tokyo, Japan, of lawful age, being by me duly sworn, deposes and says:

Direct Examination

By Mr. Tamba:

Q. Mr. Kodaira, what is your present employment or occupation?

A. I am a reporter for the Associated Press Tokyo branch office.

Q. Where were you born?

A. I was born at 19 Rokken-cho, Wakuyamachi, Tota-Gun, Miyagi Prefecture, Japan.

Q. And you are a citizen and a national of Japan, is that correct? A. Right.

Q. Have you ever lived in the United States?

A. Yes.

Q. Do you know for how many years?

A. For about ten years.

(Deposition of Toshikatsu Kodaira.)

Q. How old were you when you first went to the United States?

A. Oh, about five years old.

Q. When did you return to Japan?

A. February, 1918.

Q. And have resided in Japan continually since that date? A. Ever since.

Q. What was your occupation during the war?

A. I was an employee of the foreign office.

Q. That is the Japanese Foreign Office?

A. Japanese Foreign Office.

Q. What were your duties, if any, during that time?

A. Monitoring foreign short wave broadcasts.

Q. Do you know a man by the name of H. Yagi?

A. Yes.

Q. How long have you known Mr. Yagi?

A. Since 1938.

Q. Do you know a man by the name of Harry Brundage? A. Well, I only met him twice.

Q. Will you tell us under what circumstances you met Harry Brundage.

Mr. DeWolfe: Objected to as incompetent, irrelevant and immaterial.

The Court: Submitted?

Mr. Collins: Yes.

The Court: Objection sustained.

(A. Shall I start from the point when Yagi phoned me up?)

(Deposition of Toshikatsu Kodaira.)

Q. Yes.

Mr. DeWolfe: I object to the answer which contains a lot of hearsay.

The Court: Objection sustained.

(A. One day, I forget the exact date, Mr. H. Yagi phoned me up at my office. He hollered into the phone: "Tosh, don't you want a trip to the United States"? Of course, I was so astonished I could not readily answer.)

Q. After that phone call did you meet Mr. Yagi by some arrangement?

Mr. DeWolfe: Objected to as incompetent, irrelevant and immaterial.

The Court: Sustained.

(A. He told me to meet him at the St. Paul's Club.)

Q. And did you meet him at the St. Paul's Club?

Mr. DeWolfe: Objected to.

The Court: Sustained.

(A. I did.)

Q. Then what was said between you and Mr. Yagi?

Mr. DeWolfe: Objected to as incompetent, irrelevant and immaterial.

The Court: Sustained.

(A. Then he said he knew a fellow named Harry Brundage.)

Q. Did he tell you how long he had known Mr. Brundage?

Mr. DeWolfe: Objected to as hearsay, incompetent, irrelevant and immaterial.

(Deposition of Toshikatsu Kodaira.)

The Court: Objection sustained.

(A. He told me he knew Mr. Brundage before the war.)

Q. What else did he tell you about Mr. Brundage?

Mr. DeWolfe: Same objection.

The Court: Same ruling.

(A. He said he was very friendly with the Brundage family.)

Q. Did he tell you that Mr. Brundage was in Japan, when you were talking to him?

Mr. DeWolfe: Objected to—no foundation laid—hearsay—immaterial and irrelevant.

The Court: Objection sustained.

(A. Yes.)

Q. Did he tell you where Mr. Brundage was?

Mr. DeWolfe: Same objection.

The Court: Same ruling.

(A. Yes.)

Q. Where did he say Mr. Brundage was?

Mr. DeWolfe: Objected to as hearsay and incompetent, irrelevant and immaterial.

The Court: Sustained.

(A. At the Dai Iti Hotel.)

Q. Did he tell you the purpose of Mr. Brundage's presence in Japan?

Mr. DeWolfe: Objected to as hearsay and incompetent.

The Court: Sustained.

(A. Yes.)

(Deposition of Toshikatsu Kodaira.)

Q. What was that purpose?

Mr. DeWolfe: Objected to as calling for the conclusion of the witness and hearsay.

The Court: Sustained.

(A. He said it was to find witnesses.)

Q. For what case?

Mr. DeWolfe: Objected to as incompetent and hearsay.

The Court: Sustained.

(A. Tokyo Rose case.) [2*]

Q. And did you and Yagi thereafter meet Brundage?

Mr. DeWolfe: Objected to as hearsay.

The Court: Indicate for the record the purpose of this testimony.

Mr. Collins: The purpose of this testimony is to show that Harry Brundage who had gone to Japan with his transportation paid by the Attorney General or the Department of Justice for the purpose of interviewing the defendant.

The Court: Just a minute. Where do you get that? Where is there anything in the record about that?

Mr. Collins: I say that is the purpose.

The Court: How can you make that statement?

Mr. Collins: That is a correct statement, Your Honor.

The Court: Does the record disclose that?

Mr. Collins: Page 620 of the reporter's tran-

* Page numbering appearing at top of page of original Reporter's Transcript.

(Deposition of Toshikatsu Kodaira.)

script of Friday, July 5, 1949, contains a question addressed to Mr. John B. Hogan, and I will read from page 619:

“Q. When did you arrive in Tokyo?

“A. I am not certain, but about the 21st or 22nd, I would say. I think we took about four or five days to get there.

“Q. About the 22nd day of March?

“A. About the 22nd day of March, 1948.

“Q. Now, Mr. Hogan, Mr. Brundidge was quartered with you at the Dai Ichi Hotel, too, was he not? A. Yes.”

Mr. Collins: These questions were propounded by me.

The Court: What was the purpose, just to establish that fact?

Mr. Collins: No, I had to do that to fix the date.

The Court: All right.

Mr. Collins: Of his being sent there.

The Court: All right.

Mr. Collins: “Q. Yes. You were sent there to investigate the defendant, were you, in Japan?

“A. No, not as broadly as that. I went there to conduct a general investigation. I went out there for a specific [3] purpose.

“Q. And the specific purpose was to interrogate the defendant.

“A. Not to interrogate the defendant, no, to merely secure the signature to the already existing

(Deposition of Toshikatsu Kodaira.)

document. I did not interrogate her as to her activities.

“Q. In other words, your instructions from the Attorney General were to secure the signature of the defendant to U. S. Exhibit No. 15 which has just been introduced in evidence, is that correct”?

Mr. Collins: May I get U. S. Exhibit No. 15? I will produce that in just a moment to show Your Honor what that exhibit is, and then the answer was:

“A. That was one of my instructions.

“Q. So far as the defendant was concerned, they were your only instructions, weren't they?

“A. As far as any contact with the defendant was concerned yes, sir.”

Now, let me go on to—and the question, coming now from page 610, relating to the interview by Mr. Brundidge and Mr. John B. Hogan of the defendant on March 26, 1948, reading from page 610 of the reporter's transcript; this was put on direct examination by Mr. DeWolfe:

“Q. Did you have a conversation with her at that time and place? A. Yes, sir.

“Q. Who were present at the conversation?

“A. Mrs. Ahn, Mr. Brundidge, the defendant and myself.”

Then the transcript shows the conversation.

Now, directing Your Honor's attention to page 630 of the very same reporter's transcript, of July

(Deposition of Toshikatsu Kodaira.)

15, 1949, a question addressed by me to Mr. John B. Hogan:

"Q. Did Mr. Brundidge accompany you to Japan as an agent for the Attorney General?

"A. No, sir. [4]

"Q. Did the Attorney General bear the expense of your transportation to Tokyo?

"A. The plane fare was paid for by the Department of Justice, yes, sir.

"Q. So you went to Tokyo at that time at the expense of the government?

"A. Only in so far as the plane was concerned, nothing else.

"Q. Had you instructed him to accompany you to Tokyo? A. No, sir.

"Q. Had the Attorney General?

"A. I think it was the reverse. He offered to go and the Attorney General accepted his offer."

The Court: Read the last question and I will rule.

The Reporter: The previous question was reported by Mr. Sherry, Your Honor. I do not have it.

Mr. Tamba: I think the last question was: "And did you and Yagi thereafter meet Brundidge"?

Mr. Collins: Yes.

Q. And did you and Yagi thereafter meet Brundidge?

Mr. DeWolfe: Objected to as incompetent, irrelevant and immaterial, no foundation having been laid.

(Deposition of Toshikatsu Kodaira.)

The Court: Objection will be sustained.

(A. Yes, the very next day.)

Q. Where and under what circumstances?

Mr. DeWolfe: Same objection.

The Court: Same ruling.

(A. Ten o'clock the next morning I met Yagi in front of the Dai Iti Hotel and Yagi called Mr. Brundage down from his room. He introduced me. Mr. Brundidge and I shook hands. He was very polite. He called us up into his room.)

(Whereupon the reading of the deposition was resumed, the questions being read by Mr. Collins and the answers by Mr. Tamba.) [5]

Q. Did Mr. Brundidge give either you or Yagi some whisky while you were in the room?

Mr. DeWolfe: Object to that as incompetent, irrelevant and immaterial.

The Court: Objection sustained. Let it go out and let the jury disregard it for any purpose in this case.

(A. Yes, we took a couple of drinks.)

Q. Then what was said by Brundidge, if anything.

Mr. DeWolfe: Objected to as hearsay, immaterial, incompetent.

The Court: Objection sustained.

(A. Well, he suggested that "you and Yagi just saw and heard Tokyo Rose broadcasting.")

Q. Did he suggest the time and place and the

(Deposition of Toshikatsu Kodaira.)

circumstances under which you heard her broadcast?

Mr. DeWolfe: Object to that as hearsay, incompetent and irrelevant.

The Court: Objection sustained.

(A. Yes, a little after the March bombing.)

Q. Did he suggest to you anything that she might have broadcast on that occasion?

Mr. DeWolfe: Object to that as immaterial, hearsay, incompetent.

The Court: Objection sustained.

(A. Yes.)

Q. What was that suggestion?

Mr. DeWolfe: Object to that as irrelevant, incompetent, hearsay.

The Court: Same ruling.

(A. That we heard Tokyo Rose broadcasting: "Soldiers, your wives are out with the war workers.")

Q. What did you say to Brundidge after he suggested that to you?

Mr. DeWolfe: Object to that as hearsay, incompetent and irrelevant.

The Court: Objection sustained.

(A. I told him it was very serious to stand as a witness so I could [6] not make up my mind immediately. I told him I had to think it over.)

Q. What did Mr. Brundidge say to you then?

Mr. DeWolfe: Same objection, sir.

The Court: Same ruling.

(A. "All right.")

(Deposition of Toshikatsu Kodaira.)

Q. Did he suggest that you go home and think it over, if you recall?

Mr. DeWolfe: Same objection.

The Court: Objection sustained.

(A. That point I don't remember.)

Q. Did you make arrangements to meet Brundidge thereafter?

Mr. DeWolfe: Object to that as incompetent and hearsay, sir.

The Court: Objection sustained.

(A. Yes.)

Q. When did you arrange this meeting with Brundidge?

Mr. DeWolfe: Object to that as immaterial, incompetent, hearsay.

The Court: Objection sustained.

(A. The next day, about the same time, at the Dai Iti Hotel.)

Q. During that first conversation who were the persons present in that hotel room?

Mr. DeWolfe: Object to that as irrelevant, incompetent, immaterial, sir.

The Court: Objection sustained.

(A. Yagi, Mr. Brundidge and me.)

Q. Did you ever meet Mr. Hogan, who is connected with the Department of Justice.

Mr. DeWolfe: Just a moment, no objection.

The Court: You may answer.

A. No.

Q. Did you have reason to believe that Mr.

(Deposition of Toshikatsu Kodaira.)

Hogan was present in Japan at the time Brundidge was there? [7]

Mr. DeWolfe: Object to that as calling for a conclusion.

The Court: Objection sustained.

(A. Oh, Yagi told me about him.)

Q. But you never met Hogan?

Mr. DeWolfe: Go ahead.

A. No.

Q. Did you return the next day, after the first conversation with Brundidge? Did you return to his hotel?

Mr. DeWolfe: Object to that as incompetent, irrelevant, and immaterial.

The Court: Objection sustained.

(A. Yes, the next day, around ten.)

Q. Where did you go?

Mr. DeWolfe: Object to that as irrelevant, incompetent, and immaterial.

The Court: Objection sustained.

(A. His room.)

Q. It was the same room.

Mr. DeWolfe: Same objection, your Honor.

The Court: Same ruling.

(A. Yes.)

Q. What was said by Brundidge, you, or by Yagi?

Mr. DeWolfe: Object to that as irrelevant, hearsay, incompetent.

The Court: Objection sustained.

(Deposition of Toshikatsu Kodaira.)

(A. I told him I made up my mind and that I am not going.)

Q. Did you mention anything to him about who Tokyo Rose might be?

Mr. DeWolfe: Object to that as hearsay, depriving the United States of the right of confrontation, incompetent.

The Court: Objection sustained.

(A. Yes, I told him that Tokyo Rose was a group of girls and Iva was only one of them.)

Q. What did he do then?

Mr. DeWolfe: Object to that as incompetent, irrelevant and immaterial.

The Court: Objection sustained. [8]

(A. Then he took a book from the shelf, it was a black cloth-covered book, I didn't see the name of the book or the author but I thought it was Clark Lee's book, and in that book he had a line underlined with pencil which said, I forgot the exact words, but it showed how Tokyo Rose came out and said, "I am Tokyo Rose.")

Q. Incidentally, when you left Brundidge's room, after the first meeting, what, if anything, did he give you?

Mr. DeWolfe: Objected to as incompetent, irrelevant.

The Court: Objection sustained.

(A. Oh, he gave me a half-finished bottle of whiskey. When I was going out he gave me a suit.)

(Deposition of Toshikatsu Kodaira.)

Q. Suit of clothing, you mean?

Mr. DeWolfe: Object to that as incompetent, immaterial.

The Court: Objection sustained.

(A. Suit of clothing.)

Q. Did he say, in substance, as follows, as you left the room, after the first meeting: "You two get together and think it over"?

Mr. DeWolfe: Objected to as hearsay, incompetent, immaterial.

The Court: Objection sustained.

(A. "You two get together and think it over.")

Q. That is, to you and Yagi?

Mr. DeWolfe: Objected to as hearsay, and no proper foundation having been laid, incompetent.

The Court: Objection sustained.

(A. At the first session or during the first session?)

Q. Yes.

Mr. DeWolfe: Same objection, sir.

The Court: Same ruling.

(A. Yes, he told us that.)

Q. And when he said "You two get together," he meant you and Yagi?

Mr. DeWolfe: Object to that, no foundation having been laid, hearsay, incompetent.

The Court: Objection sustained. [9]

(A. Yes.)

Q. And when you told him the next day you had made up your mind, did you tell him why?

(Deposition of Toshikatsu Kodaira.)

Mr. DeWolfe: Objected to as hearsay, incompetent, no proper foundation having been laid.

The Court: Objection sustained.

(A. Yes.)

Q. What did you tell him?

Mr. DeWolfe: Objected to as hearsay, incompetent.

The Court: Objection sustained.

(A. I told him I was a Christian Pastor's son and that it was against my fundamental principles to tell any lies.)

Q. What did Brundidge do when you said that?

Mr. DeWolfe: Objected to as incompetent, irrelevant, immaterial, hearsay.

The Court: Objection sustained.

(A. He just nodded.)

Q. Did he shrug his shoulders, do you recall?

Mr. DeWolfe: Object to that as hearsay, calling for a conclusion, incompetent, irrelevant and immaterial.

The Court: Objection sustained.

(A. Well, that I don't know.)

Q. Did he say: "All right, it is up to you?"

Mr. DeWolfe: Objected to as hearsay, incompetent, irrelevant and immaterial, no foundation having been laid.

The Court: Keeping in mind the rulings of the court, it is clearly a case of hearsay testimony here, counsel.

Mr. Collins: Is your Honor making a ruling?

(Deposition of Toshikatsu Kodaira.)

The Court: The objection is sustained.

(A. Yes.)

Q. Do you recall him saying that.

Mr. DeWolfe: Objected to as incompetent, irrelevant and immaterial.

The Court: Objection sustained.

(A. Yes, I do.) [10]

Q. Then what did you and Yagi do?

Mr. DeWolfe: Objected to as incompetent, irrelevant and immaterial, no foundation having been laid.

The Court: Objection sustained.

(A. We came out of his room, out of the Dai Iti Hotel, and Yagi and I entered a Japanese tea parlor, a coffee house, I think you call it, had a cup of coffee together.)

Q. What was said by you and what was said by Yagi at that place?

Mr. DeWolfe: Objected to as hearsay, irrelevant, immaterial and incompetent.

The Court: Objection sustained.

(A. I told Yagi that "Damn you. We didn't contact each other during the war, and it was almost impossible for outsiders to get into the Radio Tokyo building, much less the studio where the broadcasting was going on." Then I told him, Yagi, how serious it was to be a witness especially in a case like this. Yagi told me, after hearing what I said and what I explained to him, he said he decided not to go, too.)

Q. Did he at that time make a statement, in

(Deposition of Toshikatsu Kodaira.)

substance, to the effect that he got a trip, or words to that effect?

Mr. DeWolfe: Objected to as hearsay, incompetent, irrelevant and immaterial.

The Court: Is there any doubt in your mind, counsel, that this is not hearsay testimony?

Mr. Collins: It isn't that, your Honor; I think that matter was just argued before your Honor by Mr. Olshausen, and it is my frank opinion that it is clearly admissible testimony, going——

The Court: It is hearsay. Now that you have a record on it, and it seems to me it is sufficient for all purposes. I don't want to deny you any legal position that you take here in this case, but it is obvious to me, and I think should be to you, that this is clearly hearsay testimony. I say that advisedly to you.

Mr. Collins: Well, I have no alternative, if your Honor please, save and except to read the deposition, to have your Honor make what rulings your Honor sees fit to make. [11]

The Court: Very well, that is a matter entirely for you. But I have clearly indicated the legal position of the court. That gives you an opportunity, if I am in error in my ruling, to—it saves your position in the matter. I can't do any more than that.

Mr. Collins: Well, it may be that there are questions, and I assume there are, that your Honor would make a favorable ruling to in here.

(Deposition of Toshikatsu Kodaira.)

The Court: Well, if there are, go through them.

Mr. Collins: Well, I mean, I can't very well do that, because it is a question here of also having a record.

The Court: All right, proceed.

Q. Did you later learn that Yagi went to the United States?

Mr. DeWolfe: Objected to as hearsay, incompetent and irrelevant.

The Court: Objection sustained.

(A. Yes.)

Q. To testify as a witness before grand jury proceedings?

Mr. DeWolfe: Same objection.

The Court: Same ruling.

(A. Yes.)

Q. State under what circumstances you learned that.

Mr. DeWolfe: Objected to as hearsay, incompetent.

The Court: Objection sustained.

(A. One Sunday, my very good friend Toshio Yamanouchi, the foreign editor of the Tokyo Shinbun, he usually comes to my house for a Sunday bath, so he must have seen Yagi Saturday night at the Japanese Press Club—Yagi told Yamanouchi that he was leaving for the United States.)

Q. Do you know a man by the name of Jim

(Deposition of Toshikatsu Kodaira.)

Woods or James Woods connected with the United States Provost Marshal?

Mr. DeWolfe: Go ahead.

A. Yes, I came to know him before Yagi came back from the United States.

Q. Under what circumstances did you meet Mr. James Woods?

Mr. DeWolfe: Objected to as incompetent, irrelevant, immaterial. [12]

The Court: Objection sustained.

(A. I was working in my office when he came in and introduced himself as being a very good friend of Yagi's.)

Q. What was said between you and Mr. Woods, in substance?

Mr. DeWolfe: Objected to as hearsay, incompetent.

The Court: Objection sustained.

(A. In substance, he wanted me to go to the United States.)

Q. Did he tell you with reference to what?

Mr. DeWolfe: Objected to as hearsay, incompetent.

The Court: Objection sustained.

(A. Yes, in the Tokyo Rose case.)

Q. You tell us, in substance, if you recall, what was said by Mr. Woods and what was said by you on that occasion. He mentioned Mr. Yagi's name to you?

Mr. DeWolfe: Objected to as immaterial, incompetent, irrelevant, hearsay.

(Deposition of Toshikatsu Kodaira.)

The Court: Objection sustained.

(A. Yes.)

Q. What did he say about Yagi?

Mr. DeWolfe: Objected to as hearsay, irrelevant and incompetent.

The Court: Objection sustained.

(A. He said he was very fond of Yagi. Very friendly with him on the way to the United States.)

Q. Did he ask you if you knew Yagi?

Mr. DeWolfe: Objected to as hearsay, incompetent.

The Court: Objection sustained.

(A. No, he introduced himself as a very good friend of Yagi.)

Q. Did Mr. Woods ask you if you knew Yagi?

Mr. DeWolfe: Objected to as hearsay.

The Court: Objection sustained.

(A. Yes.)

Q. Did you answer him yes or no? [13]

Mr. DeWolfe: Same objection.

The Court: Same ruling.

(A. I said "Yes.")

Q. What did he ask you with reference to Yagi, with reference to this case, and I am speaking of the occasion in your office in Radio Tokyo, when you were talking to Mr. Woods?

Mr. DeWolfe: Objected to as incompetent, hearsay.

The Court: Objection sustained.

(Deposition of Toshikatsu Kodaira.)

(A. He wanted me to say, yes, or no, if I was going with him to the United States.)

Q. Who, Mr. Woods?

Mr. DeWolfe: Same objection.

The Court: Same ruling.

(A. Yes.)

Q. Did he ask you with reference to what?

Mr. DeWolfe: Objected to as hearsay, your Honor.

The Court: Objection sustained.

(A. On this Tokyo Rose case.)

Q. What did you say to Mr. Woods at that time?

Mr. DeWolfe: Objected to as hearsay.

The Court: Objection sustained.

(A. Well, I didn't say, yes, or no, immediately.)

Q. What were your reasons for not answering, yes, or not?

Mr. DeWolfe: Objected to as calling for a conclusion, hearsay, incompetent, irrelevant and immaterial.

The Court: Objection sustained.

(A. I thought the reason I should not commit myself was this. If I said "Yes," I would be working against my principles. I would be telling lies. If I said: "No," I might hurt Yagi.)

Q. So you didn't give Mr. Woods an immediate answer?

Mr. DeWolfe: Same objection, sir.

The Court: Same ruling.

(Deposition of Toshikatsu Kodaira.)

(A. No.)

Q. Did you seek any independent advice regarding the answer you should give Mr. Woods? [14]

Mr. DeWolfe: Go ahead.

A. Yes.

Q. From whom did you seek that advice?

Mr. DeWolfe: Objected to as incompetent, irrelevant, immaterial, hearsay.

The Court: Objection sustained.

(A. I sought advice from Mrs. Tom Lambert.)

Q. Who is she?

Mr. DeWolfe: Objected to as incompetent, irrelevant, hearsay, immaterial.

The Court: Objection sustained.

(A. She is the wife of Tom Lambert, an Associated Press correspondent in Tokyo.)

Q. What did Mrs. Lambert tell you?

Mr. DeWolfe: Same objection, if the Court please.

The Court: Objection sustained.

(A. She told me to tell the truth.)

Q. And after you talked to Mrs. Lambert, what did you do?

Mr. DeWolfe: Objected to as incompetent, irrelevant, and immaterial.

The Court: Objection sustained.

(A. Jimmie Woods called me in his office and I gave him the statement.)

Q. What was the substance of the statement you gave Mr. Woods?

(Deposition of Toshikatsu Kodaira.)

Mr. DeWolfe: Object to that and not the best evidence, hearsay.

The Court: Objection sustained.

(A. That it was not with Yagi that I saw this broadcast.)

Q. Later you were confronted with Mr. Yagi?

Mr. DeWolfe: Objected to as incompetent, irrelevant, and immaterial.

The Court: Objection sustained.

(A. Yes.)

Q. And what, if anything, did Yagi do at that time and place?

Mr. DeWolfe: Objected to as incompetent, hearsay.

The Court: Same ruling.

(A. Woods said: "Tosh says Yagi was not with him during the broadcast.") [15]

Q. What did Yagi say.

Mr. DeWolfe: Objected to as incompetent.

The Court: Same ruling.

(A. Then Woods says: "Yagi says that Tosh was with him during the broadcast. Which is right? I told Jim "Yagi will answer." Yagi admitted that he was not with me.)

Q. Going back to the meeting with Brundidge at the Dai Iti Hotel, did he ask you if you knew a man by the name of Ken Oki?

Mr. DeWolfe: Same objection, sir.

The Court: Same ruling.

(A. Yes, he did.)

(Deposition of Toshikatsu Kodaira.)

Mr. DeWolfe: Objected to as hearsay, sir.

The Court: Same ruling.

(A. I said I did not know him.)

Q. Mr. Kodaira, you have met Mr. Tilman of the Federal Bureau of Investigation?

Mr. DeWolfe: Go ahead.

A. I have, once.

Q. And you have not told him what you have told us here this morning?

Mr. DeWolfe: Objected to as incompetent, irrelevant and immaterial.

The Court: Objection sustained.

(A. Correct.)

Q. When you met him, he asked you what you knew about the Toguri case?

Mr. DeWolfe: Objected to as hearsay.

The Court: Objection sustained.

(A. That's correct.)

Q. And he told you that he wanted to see you again about Mr. Yagi at some later date?

Mr. DeWolfe: Same objection, sir.

The Court: Same ruling.

(A. Yes.)

Q. Do you know a man by the name of Tomatsu Murayama?

Mr. DeWolfe: Go ahead.

A. Yes, I do.

Q. Do you know what connection, if any, he had with Camp Bunka? A. I didn't get that.

(Deposition of Toshikatsu Kodaira.)

Q. Do you know what connection, if any, he had with Camp Bunka?

Mr. DeWolfe: Objected to as incompetent, irrelevant and immaterial.

The Court: Objection sustained.

(A. Oh, Camp Bunka, yes, he was there to analyze monitor broadcasts and at the same time criticize the propaganda line adopted by JOAK.)

Q. Did he ever complain to you about the treatment of prisoners of war at Camp Bunka?

Mr. DeWolfe: Same objection, hearsay, sir.

The Court: Same ruling.

(A. Oh, he did, many times.)

Q. Do you know a man by the name of Major Tsuneishi?

Mr. DeWolfe: Go ahead.

A. Yes.

Q. You met him on April 26 of this year, is that correct?

A. Correct.

Q. Where did you meet him?

A. Oh, he was waiting in front of Radio Tokyo building and came up to the A.P. office with me.

Q. And he later came to your home on the 27th?

A. That's right.

Q. Did you talk to him on the 26th in Radio Tokyo?

A. Not much.

Q. Well, did a man by the name of Ken Ishii approach Major Tsuneishi and you?

A. He approached me, I should say, approached Tsuneishi.

(Deposition of Toshikatsu Kodaira.)

Q. What did he say to Tsuneishi?

A. Told him that the witnesses should not contact the defense.

Q. Did the name of Major Cousens come up in the conversation between you and Major Tsuneishi? [17] A. Yes.

Q. State whether or not Major Tsuneishi at that time and place, either the 26th or the 27th, said to you that he actually ordered Major Cousens to broadcast over the radio?

Mr. DeWolfe: Objected to as hearsay.

The Court: Objection sustained.

(A. He did.)

Q. Did he state to you that he had made a contrary statement on some other occasion?

Mr. DeWolfe: Same objection.

The Court: Same ruling.

(A. Yes, he did.)

Q. Did he say why he made that contrary statement?

Mr. DeWolfe: Objected to as hearsay, incompetent, irrelevant, immaterial, a long answer involving hearsay, sir.

The Court: Sustained.

(A. Yes, Major Cousens' name came up during the conversation we had at my home. I told Tsuneishi that I had great respect for Major Cousens. Tsuneishi said he regretted he did a very sorry thing against Major Cousens. He explained the reasons that while Major Cousens was on trial

(Deposition of Toshikatsu Kodaira.)

in Australia, an Australian investigator came and asked Tsuneishi whether or not Tsuneishi ordered Major Cousens to broadcast. Tsuneishi said he denied he had given any orders. He regretted that very much. He did it because he thought he would implicate his senior officers.)

Q. Who were his senior officers, if you remember?

Mr. DeWolfe: Go ahead.

A. Colonel Nagai and General Arisue, and then Field Marshal Gen. Sugiyama.

Q. In other words, the reason why he denied it at that time, that is giving Cousens orders to broadcast was that he might implicate his senior officers?

Mr. DeWolfe: Object to that as calling for a conclusion, incompetent, irrelevant and immaterial.

The Court: Objection sustained. [18]

(A. That's right.)

Q. Do you recall a broadcast coming over Radio Tokyo about the time of the battle of the Leyte Gulf regarding the loss of ships?

Mr. DeWolfe: Go ahead.

A. Yes, I do.

Q. Who broadcast that information, if you know? A. It was Joe Hirakawa.

Q. Was that broadcast somewhat confused?

A. It was greatly confused.

Q. In what respect?

A. Hirakawa sank two more Japanese battle-ships than was necessary.

(Deposition of Toshikatsu Kodaira.)

Q. Did you later hear a shortwave station in San Francisco on the subject?

A. Yes, then came a hit-back.

Q. What did it say?

Mr. DeWolfe: Objected to as hearsay, incompetent, irrelevant and immaterial.

The Court: The objection will be sustained.

(A. Said: "Radio Tokyo did it again.")

Q. Incidentally, was the loss of ships broadcast as a flash news item, if you know?

Mr. DeWolfe: Go ahead.

A. I think it was.

Q. Are you willing to come to the United States and testify as to the facts stated in your deposition this morning?

Mr. DeWolfe: Go ahead.

A. On one condition, if the A.P. office permits.

Q. I want to ask you something else, did Brundidge suggest to you after you went to his hotel on the second occasion, that you forget all about this conversation you had with him?

Mr. DeWolfe: Objected to as hearsay, incompetent.

The Court: Objection sustained.

(A. I forget the exact words he used at that time but I received the impression that he wanted to keep all this confidential. Yes, he told me not to write any stories but he broke the story by an article in the Nashville, Tennessee, paper, and AP carried it from Tennessee.) [19]

(Deposition of Toshikatsu Kodaira.)

Mr. Collins: Cross-examination by Mr. Storey.

Mr. DeWolfe: Cross-examination, under the new Federal Criminal Rules, is waived, sir.

Mr. Collins: The defendant will offer the cross-examination by Mr. Storey.

(Whereupon the cross-examination was read, Mr. Collins reading the question and Mr. Tamba the answers.)

Q. When you first met Mr. Brundidge, did he tell you what his business in Japan was at that time?

Mr. DeWolfe: Objected to as hearsay, sir.

The Court: Objection sustained.

(A. Oh, yes, he showed me his passport issued by the Department of Justice, some sort of certificate.)

Q. Was it something like this (Mr. Storey shows a passport to the witness)?

Mr. DeWolfe: Object to that as hearsay.

The Court: Objection sustained.

(A. No.)

Q. Did Mr. Brundidge tell you that he was a representative of the Department of Justice at the time he first met you?

Mr. DeWolfe: Objected to as hearsay.

Mr. Collins: That goes right to the very issue, if your Honor please.

The Court: Yes, but it is hearsay; the objection will be sustained.

(Deposition of Toshikatsu Kodaira.)

(A. Yes.)

Q. Did Mr. Brundidge tell you that he was also a newspaper man?

Mr. DeWolfe: Objected to as hearsay, incompetent.

The Court: Objection sustained.

(A. Not exactly. Yagi said Brundidge was an associate-editor of a certain Hearst Magazine.)

Q. Did Mr. Brundidge tell you that he was a representative of the Department of Justice when he talked to you concerning the Iva Toguri case?

Mr. DeWolfe: Objected to as hearsay. [20]

The Court: Objection sustained.

(A. I don't remember that point.)

Q. What was the paper that Mr. Brundidge showed you?

Mr. DeWolfe: Objected to as not the best evidence, incompetent, irrelevant and immaterial. Also hearsay.

The Court: Objection sustained.

(A. I vaguely remember he showed me some kind of a can you call it a certificate, or, I don't know.)

Q. Did he show you anything like this (Mr. Storey shows witness his Department of Justice identification card)?

Mr. DeWolfe: Objected to as incompetent, irrelevant, and immaterial.

The Court: Objection sustained.

(A. No, I don't remember. He showed me

(Deposition of Toshikatsu Kodaira.)

something but I don't know what it was. He showed me something but it is so vague now.)

Q. Do you recall seeing on the paper that Mr. Brundidge showed you anything pertaining to the Department of Justice?

Mr. DeWolfe: Objected to as immaterial, incompetent, and irrelevant.

The Court: Objection sustained.

(A. Anything pertaining to the Department of Justice—I don't think I remember.)

Q. Mr. Kodaira, have you ever seen a military entry permit the civilians have which gives permission for persons to enter Japan (Mr. Storey shows witness a military entry permit)?

Mr. DeWolfe: Go ahead.

A. No, we are not so familiar with them.

Q. How long were you and Mr. Brundidge in the room on the first occasion that you met him?

Mr. DeWolfe: Objected to as incompetent, irrelevant and immaterial.

The Court: Objection sustained.

(A. About an hour. Little over an hour.) [21]

Q. Can you recall what Mr. Brundidge said to you when you first met him? Did he identify himself as an investigator in this case?

Mr. DeWolfe: Go ahead.

A. I don't recall his exact words.

Q. During the conversation with you did he mention to you that he was a newspaper man?

Mr. DeWolfe: Objected to as hearsay, incompetent.

(Deposition of Toshikatsu Kodaira.)

The Court: Objection sustained.

(A. I don't think he did because Yagi told me before.)

Q. Told you what?

Mr. DeWolfe: Same objection, sir.

The Court: Same ruling.

(A. Before we met, Yagi told me that he came in with the first wave of the Occupation as a correspondent.)

Q. Then at the time you first met and talked with Mr. Brundidge, you didn't know whether he was a newspaperman or representative of the Department of Justice?

Mr. DeWolfe: Object to that as calling for a conclusion, hearsay, incompetent, irrelevant, immaterial.

The Court: Objection sustained.

(A. This is it, you see, at the meeting we had, Yagi and I, at the St. Paul's Club, Yagi told me that the Brundidge family was very friendly, and that Brundidge worked as a newspaper man in Chicago at the time when Al Capone was indicted, so he gave me the impression, this is Yagi, that Brundidge is a very good friend of Mr. Tom Clark.)

Q. Do you recall anything that was said by Brundidge that would lead you to believe that he was a representative of the Department of Justice?

Mr. DeWolfe: Object to that as calling for a conclusion, hearsay, not the best evidence.

The Court: Objection sustained.

(Deposition of Toshikatsu Kodaira.)

(A. I personally thought, from Yagi's explanation, that Mr. Brundidge was acting in behalf of the Department of Justice, because Yagi told me that Mr. Hogan was the formal representative of the Department of Justice.) [22]

Q. Did you see or talk to Mr. Hogan at all during the time he was here?

Mr. DeWolfe: Pardon me just a moment. No objection.

A. Not at all, not at all.

Q. During your conversation with Mr. Brundidge, did he mention to you a trip to the United States?

Mr. DeWolfe: Objected to as hearsay, incompetent, irrelevant and immaterial.

The Court: Objection sustained.

(A. He more or less suggested that.)

Q. Did he—but he didn't definitely ask you or promise you a trip to the States, that you can recall?

Mr. DeWolfe: Objection to as hearsay.

The Court: Objection sustained.

(A. No.)

Q. During your conversation with Brundidge did you tell him that you had witnessed a Zero Hour broadcast?

Mr. DeWolfe: Objected to as hearsay, incompetent.

The Court: Objection sustained.

(Deposition of Toshikatsu Kodaira.)

(A. You mean if I saw the Zero Hour broadcast, yes.)

Q. Did Mr. Brundidge ask you at that time what Miss Toguri had to say on this program?

Mr. DeWolfe: Objected to as immaterial, hearsay, incompetent.

The Court: Objection sustained.

(A. I told him I saw the broadcast. But at the time of the broadcast, Iva was in the room but was not broadcasting. The time was shortly before or after the battle of the Philippine sea.)

Q. Mr. Kodaira, you have testified that Tokyo Rose was a group of girls?

Mr. DeWolfe: Go ahead.

A. Yes.

Q. How do you know this information?

Mr. DeWolfe: Just a moment Mr. Tamba. Object to that as hearsay.

The Court: Objection sustained. [23]

(A. Because I saw other girls besides Toguri.)

Q. How many times did you see the Zero Hour broadcast?

Mr. DeWolfe: Go ahead.

A. Once.

Q. Were there other girls at the studio at the time you saw the broadcast?

Mr. DeWolfe: Go ahead.

A. Yes, I remember the color of the clothes worn by Toguri. Miss Toguri had a yellow dress. Another girl had a dark dress. I mean black, excuse me.

(Deposition of Toshikatsu Kodaira.)

Q. During the broadcast, did these girls refer to themselves as Tokyo Rose?

A. I don't think they did.

Q. Well, then, how do you know they were called Tokyo Rose?

Mr. DeWolfe: Objected to as calling for a conclusion, hearsay, incompetent, irrelevant and immaterial.

The Court: Objection sustained.

(A. It became a very famous program, and being on the inside, many information can come to the sub-committee.)

Q. Then you received this information by way of an official report to the foreign office?

Mr. DeWolfe: Objected to as hearsay, not the best evidence, incompetent.

The Court: Objection sustained.

(A. Not that, because this program was entirely under the control of the army. The Foreign Office, the Information Board, even the JOAK, had no control over it.)

Q. Then all you know about the group of girls being referred to as Tokyo Rose is what someone else told you?

Mr. DeWolfe: Objected to as hearsay, incompetent, irrelevant, and immaterial.

The Court: Same ruling.

(A. Yes, you see, I was in charge of this sub-committee of the Board of Information which had an office in the Radio Tokyo, while Itabashi, the

(Deposition of Toshikatsu Kodaira.)

original chairman, was sick, and this sub-committee [24] was composed of representatives of the Army, or shall I give you the names, the Army, Mr. Norizane Ikeda, the Navy, I forget this name, the Foreign Office, Board of Information, and through this man Ikeda we used to obtain many information.)

Q. Was it your duty to monitor at times the Zero Hour?

Mr. DeWolfe: Go ahead, Mr. Tamba.

A. That was not my duty.

Q. Did you ever monitor the Zero Hour program?

Mr. DeWolfe: Go ahead.

A. Sometimes somebody checked it but I never did myself.

Q. From the Japanese standpoint, what was the purpose of the Zero Hour program?

Mr. Collins: The defendant will object to that on the ground that is calling for the opinion and conclusion of the witness, it is hearsay, improper cross-examination, and it is incompetent, irrelevant and immaterial.

Mr. DeWolfe: Well, no further objection is necessary. We both agree on that one, then.

(A. Well, I think it was more or less the army's purpose to demoralize the American soldiers down south.)

Mr. Collins: And then the next question too.

Mr. DeWolfe: I will agree it all go out if you

(Deposition of Toshikatsu Kodaira.)

want to. Next one, anyone you want to go out; it is all right with me.

(Q. In other words the Zero Hour program was an instrument of psychological warfare?)

(A. Exactly.)

Mr. Collins: Then the next:

Q. And you of your own knowledge know that Miss Toguri participated in that program?

Mr. DeWolfe: Just a minute. This is line 22?

Mr. Collins: Line 22.

Mr. Tamba: Line 24 is the answer, Mr. DeWolfe.

Mr. DeWolfe: Line 24, all right, go ahead.

A. She was in the room, but I didn't hear her.

Q. In your official capacity as a member of the Board, did you [25] know that Miss Toguri was participating in the Zero Hour program?

Mr. DeWolfe: Go ahead.

A. Well, as I told you before, we had no official control over this broadcast and my information was indirect and I never—I only saw her once in that studio, but at that time she was not broadcasting.

Q. Had Yagi already gone to the United States before Mr. Woods contacted you?

Mr. DeWolfe: Objected to as irrelevant and incompetent, sir.

The Court: Objection sustained.

(A. Yagi was in the United States.)

Q. At the time of your conversation with Mr. Woods?

(Deposition of Toshikatsu Kodaira.)

Mr. DeWolfe: Object to that as incompetent, irrelevant, and immaterial.

The Court: Objection sustained.

(A. Right.)

Q. In Mr. Woods' conversation with you was he attempting to find out what happened between Yagi, Brundidge, and yourself?

Mr. DeWolfe: Object to that as calling for a conclusion, hearsay, incompetent.

The Court: Objection sustained.

(A. He was not trying to find that out. He just mentioned about Yagi.)

Q. What was the purpose of confronting you with Mr. Yagi, in Mr. Woods' presence?

Mr. DeWolfe: Object to that as calling for a conclusion, hearsay, incompetent.

The Court: Objection sustained.

(A. I think to find out the truth.)

Q. When did this confrontation take place? Soon after Yagi returned from the United States?

Mr. DeWolfe: Objected to as incompetent, irrelevant, immaterial, hearsay.

The Court: Sustained. [26]

(A. Not soon, but a little later, about a week and a half later.)

Q. And at that time did you tell Mr. Woods essentially what you told us today in this deposition?

Mr. DeWolfe: Same objection, sir.

The Court: Same ruling.

(Deposition of Toshikatsu Kodaira.)

(A. Yes. Just a moment, I want to make a correction in that statement. Can I?)

Q. Yes.

Mr. DeWolfe: Same objection, Your Honor.

The Court: Same ruling.

(A. What I told Mr. Woods was mostly about Yagi. If Yagi was with me when I saw this broadcast. I repeatedly told him that Yagi was absolutely not with me when I saw this broadcast.)

Q. Then, when you told Mr. Woods that, that led up to this confrontation with Yagi, that took place later?

Mr. DeWolfe: Object to that as hearsay, incompetent.

The Court: Objection sustained.

(A. Yes.)

Q. Mr. Kodaira, can you recall the date you have the conversation with Major Tsuneishi concerning the Major Cousens incident?

Mr. DeWolfe: Objection to that as incompetent, and an objection was sustained on direct examination to it as hearsay.

The Court: Objection sustained.

(A. He came to see me around ten o'clock, 26th of April, and then——)

Q. What year?

Mr. DeWolfe: Same objection.

The Court: Same ruling.

(A. This year. In April of this year, 1949. Then we could not talk much at my office so I asked

(Deposition of Toshikatsu Kodaira.)

him to come over to my place seven p.m. the next day, that is April 27, 1949.)

Q. Did Major Tsuneishi also tell you that he made the statement concerning Major Cousens to the Australian authorities so as not to incriminate himself?

Mr. DeWolfe: Objected to as improper, and as incompetent, irrelevant and immaterial, hearsay, the same objection to the same matter sustained on direct examination. [27]

The Court: Objection sustained.

(A. He did not mention anything about himself. He regretted very much the denials he made to this Australian investigator.)

Q. And these denials were also for the purpose of not incriminating himself as a war criminal?

Mr. DeWolfe: Same objection, sir, same matter.

The Court: Sustained.

(A. No, he said he at that time didn't know which way the wind was blowing. He thought it was concerning war crimes.)

Q. Mr. Kodaira, do you know Miss Toguri personally?

Mr. DeWolfe: Go ahead.

A. No.

Q. Do you know Mr. Philip D'Aquino?

A. No.

Q. You have never talked to Mr. D'Aquino?

A. No.

Mr. Collins: Redirect examination by Mr. Tamba.

(Deposition of Toshikatsu Kodaira.)

(Whereupon the redirect examination was read, Mr. Collins reading the questions and Mr. Tamba the answers.)

Q. Mr. Kodaira, have you had a conversation with Mr. Yagi in the past week or ten days in which he told you that when he was pressed to give your name in San Francisco he first went to see Brundidge, before he mentioned your name.

Mr. DeWolfe: Objected to as hearsay.

The Court: Objection sustained.

(A. He told me that when they pressed with whom he saw the broadcast he went to Mr. Hogan first, then Mr. Hogan referred him to Mr. Brundidge.)

Q. Then Brundidge told him to give your name?

Mr. DeWolfe: Same objection, if the court please.

The Court: Same ruling.

(A. That is what he told me.)

Q. In your discussion with Mr. James Woods there was no occasion to bring out Brundidge's name, is that correct?

Mr. DeWolfe: Object to that as incompetent, hearsay, calling for a conclusion. [28]

The Court: Objection sustained.

(A. He asked me once if I met Mr. Brundidge. I said, yes, but that was all.)

Q. In the past few days has Mr. Yagi told you that he made a full and complete statement regard-

(Deposition of Toshikatsu Kodaira.)

ing this affair to Mr. Tillman of the F.B.I.?

Mr. DeWolfe: Objected to as hearsay.

The Court: Objection sustained.

(A. That is what he told me. He told me that he mentioned Mr. Brundidge's name six or seven times.)

Q. Counsel has asked you about Zero Hour broadcast demoralizing the American troops, do you know of your own knowledge that it actually demoralized American troops?

Mr. DeWolfe: Well, that is redirect examination, covering a matter taken up on cross-examination which he and myself agreed should go out on cross-examination. He didn't want it in, the answer to it, and now this is on redirect. It is objected to as incompetent.

The Court: The objection is sustained.

(A. I think it didn't work.)

Mr. Collins: Then the next portion reads as follows:

"Tokyo, Japan, 28 May, 1949, by Mr. Tamba: Mr. Ainsworth, this deposition of Toshikatsu Kodaira is opened by stipulation for the purpose of offering certain items in evidence, please let the record show this. Redirect examination by Mr. Tamba."

(Whereupon the redirect examination by Mr. Tamba under date of 28 May, 1949, referred to above, was read, Mr. Collins reading the questions and Mr. Tamba the answers.)

(Deposition of Toshikatsu Kodaira.)

Q. Mr. Kodaira, I hand you three articles of clothing and ask you what they are. What are they, a suit of clothes?

Mr. DeWolfe: Objected to as incompetent, irrelevant and immaterial.

The Court: Objection sustained.

(A. Yes.) [29]

Q. And where did you first see that suit of clothes?

Mr. DeWolfe: Objected to as incompetent, irrelevant and immaterial.

The Court: Objection sustained.

(A. I saw it in Mr. Brundidge's room at the Dai Iti Hotel.)

Q. On what occasion.

Mr. DeWolfe: Same objection.

The Court: Same ruling.

(A. When I met him with Yagi the first time.)

Q. And is that the suit he gave you?

Mr. DeWolfe: Same objection.

The Court: Same ruling.

(A. Yes.)

Q. Has that suit been changed any, or altered, since that time?

Mr. DeWolfe: Objection to as incompetent, irrelevant and immaterial.

The Court: Objection sustained.

(A. Yes, the coat and trousers.)

Q. What was done with them?

(Deposition of Toshikatsu Kodaira.)

Mr. DeWolfe: Same objection, if the Court please.

The Court: Same ruling.

(A. Shortened to fit my size.)

Q. Who did that altering?

Mr. DeWolfe: Objected to as immaterial and incompetent.

The Court: Same ruling.

(A. My wife.)

Q. I invite your attention to the item called "vest" and ask you whose name is that inside the vest? (Witness shown vest.)

Mr. DeWolfe: Objected to as incompetent, irrelevant and immaterial.

The Court: Objection will be sustained.

(A. Harry Brundidge.)

Q. And bears No. 51985 and date of April 12, 1939?

Mr. DeWolfe: Objected to as incompetent, irrelevant and immaterial. [30]

The Court: Objection sustained.

(A. Yes.)

Q. I show the trousers and particularly the left rear pocket and ask you what appears there, if anything? (Witness shown trousers.)

Mr. DeWolfe: Same objection.

The Court: Same ruling.

(A. Harry Brundidge.)

Q. And number 51985? And date April 12, 1939?

(Deposition of Toshikatsu Kodaira.)

Mr. DeWolfe: Same objection.

The Court: Same ruling.

(A. Correct.)

Q. And you never saw that until I showed it to you, is that true?

Mr. DeWolfe: Objected to as incompetent, irrelevant and immaterial.

The Court: Same ruling.

(A. That's correct.)

Mr. Collins: And then by Mr. Tamba: "Let the record show that no name appears——"

Mr. DeWolfe: Just a moment now, Mr. Collins. Mr. Tamba wanted to make the record show that the labels in this clothing, as testified to—that there were none. I don't think that is proper to go in the record here at this time. He makes a statement here as to certain labels in the clothing, Mr. Tamba does, "Let the record show so and so," and I object to that statement.

The Court: It may go out.

Mr. Collins: It simply said, "Let the record show that no name appears on the coat * * *"

Mr. DeWolfe: There is more than that.

Mr. Collins: Well, it doesn't—I mean, it is part and parcel of the deposition, if your Honor please. It is a statement of counsel.

The Court: It may go out and let the jury disregard it.

Mr. DeWolfe: Now the cross-examination——

Mr. Collins: Just a moment, Mr. Dewolfe. The

(Deposition of Toshikatsu Kodaira.)

matter that is now stricken by the court and that the court instructed the jury to disregard is that matter which appears commencing by [31] Mr. Tamba, on line 4, page 19 of the deposition, and extending down to and including the material, or the words, "Kodaira deposition," line 9 of page 19 of the said deposition.

The Court: Let the record so show.

(By Mr. Tamba: Let the record show that no name appears on the coat but that it shows the label Oxford Clothes, purchased from D. & J. Williamson, Inc., St. Louis, Mo., and I offer these three items as defendant's exhibit "1" in Kodaira deposition.)

Mr. DeWolfe: All right. The next is cross-examination, sir; it is not offered by the United States.

Mr. Collins: The defendant will offer the cross-examination of the witness by Mr. Storey.

(Whereupon the recross-examination was read, the questions being read by Mr. Collins and the answers by Mr. Tamba.)

Q. What did Mr. Brundidge say to you when he gave you this suit?

Mr. DeWolfe: Objected to as hearsay.

The Court: Objection sustained.

(A. Oh, I hesitated, and he said: "Take it," and at the same time he said he gave another suit to Takasumi Mitsui. I think that was all.)

Q. Did you take the suit to Mr. Mitsui?

(Deposition of Toshikatsu Kodaira.)

Mr. DeWolfe: Objected to as incompetent, irrelevant and immaterial.

The Court: Objection sustained.

(A. Who, did I?)

Q. Yes.

Mr. DeWolfe: Same objection.

The Court: Same ruling.

(A. No.)

Q. Did Mr. Brundidge say anything else to you at the time he gave you the suit?

Mr. DeWolfe: Objected to as hearsay, sir.

The Court: Objection sustained. [32]

(A. I don't quite remember.)

Q. When did Mr. Brundidge give you this suit, the first time you saw him?

Mr. DeWolfe: Objected to as incompetent, Your Honor.

The Court: Objection sustained.

(A. Right.)

Q. Did Mr. Brundidge give you anything else at that time?

Mr. DeWolfe: Same objection, may it please the court.

The Court: Same ruling.

Mr. Collins: And the next page is an addenda to said deposition, it is dated Tokyo, Japan, 2 June 1949, by Mr. Tamba: "Mr. Ainsworth, I am asking that this deposition be reopened for the second time for the purpose of asking a few brief questions."

(Deposition of Toshikatsu Kodaira.)

(Whereupon redirect examination, dated 2 June 1949, was read, questions being read by Mr. Collins and answers by Mr. Tamba.)

Q. Mr. Kodaira, on the first occasion when you and Yagi met Mr. Brundidge at the Dai Iti Hotel and after you had a discussion with him, did Brundidge leave the room, if you recall?

Mr. DeWolfe: Objected to as incompetent, irrelevant and immaterial.

The Court: Objection sustained.

(A. As far as I can recall he left the room. He left us two alone.)

Q. When you say us two, you mean you and Yagi?

Mr. DeWolfe: Same objection, sir.

The Court: Same ruling.

(A. Yes, me and Yagi.)

Q. And you and Yagi had a discussion?

Mr. DeWolfe: Objected to as incompetent, irrelevant and immaterial. Also hearsay.

The Court: Objection sustained.

(A. Yes, in Japanese.)

Q. Can you recall the substance of that discussion?

Mr. DeWolfe: Same objection, Judge.

The Court: Same ruling. [33]

(A. I cannot recall the conversation in Japanese with Yagi, but I told him that to stand as a witness is a very serious matter.)

(Deposition of Toshikatsu Kodaira.)

Q. Then did Brundidge return to the room later?

Mr. DeWolfe: Objected to as incompetent, irrelevant and immaterial.

The Court: Same ruling.

(A. Yes, he did.)

Q. Now, did Brundidge say anything to you on that occasion or on the second occasion, if you recall, indicating that he was anxious to have two witnesses?

Mr. DeWolfe: Objected to as hearsay.

The Court: Objection sustained.

(A. Well, he did not suggest clearly, but I received that impression.)

Q. What impression did you receive?

Mr. DeWolfe: Objected to as calling for a conclusion, hearsay.

The Court: The objection is sustained.

(A. Of trying to get Yagi and I.)

Q. Now, referring to the second meeting with Brundidge, which was on the following day, and after you had told him you would not testify, did you have a discussion with him regarding Niseis?

Mr. DeWolfe: Objected to as hearsay.

The Court: Objection sustained.

(A. Yes.)

Q. What was said by you with reference to Niseis and what was said by him if you recall?

Mr. DeWolfe: Objected to as hearsay, your Honor.

The Court: Sustained.

(Deposition of Toshikatsu Kodaira.)

(A. Well, I told him about the plight of the Niseis in Japan, especially when they were caught in a war, and then I inferred that Niseis were not treated good over here, in Japan, and they were not treated decently in the United States either.)

Q. What did he say when you made that statement? [34]

Mr. DeWolfe: Objected to as hearsay, sir.

The Court: Objection sustained.

(A. He told me, sharply, that the Niseis were getting good treatment since the war, especially in the Eastern part of the United States, and then he mentioned Niseis in Chicago.)

Q. Then did he get into a discussion about Iva again?

Mr. DeWolfe: Objected to as incompetent and hearsay.

The Court: Objection sustained.

(A. Yes, he did.)

Q. What did he say, if you can remember?

Mr. DeWolfe: Objected to as hearsay.

The Court: Objection sustained.

(A. He said: "In America they don't hang women, and after the trial and after sentence she can live in America forever.")

Q. Was that toward the end of your discussion with him?

Mr. DeWolfe: Objected to as incompetent and irrelevant.

The Court: Objection sustained.

(Deposition of Toshikatsu Kodaira.)

(A. Yes.)

Q. Then what did you do and what did he do?

Mr. DeWolfe: Objected to as immaterial and incompetent.

The Court: Same ruling.

(A. Then I thanked him and shook hands with him and left the room with Yagi.)

Mr. Collins: Then recross-examination by Mr. Storey.

Mr. DeWolfe: Which is not offered by the United States.

Mr. Collins: The defendant will offer recross-examination of the witness by Mr. Storey.

(Whereupon recross-examination was read, Mr. Collins reading the questions and Mr. Tamba the answers.)

Q. Did you ever meet and talk to Mrs. D'Aquino?

Mr. DeWolfe: Go ahead.

A. Mrs. D'Aquino, no.

Q. Did you ever see Mrs. D'Aquino while she was at the radio station broadcasting?

Mr. DeWolfe: Go ahead. [35]

A. Mrs. D'Aquino, again?

Q. Yes.

A. I saw her once. I think I mentioned earlier that she was not broadcasting then.

Q. So far as you personally know that is the only thing you know concerning Mrs. D'Aquino and her activities? A. That's right.

Q. What specifically, did Mr. Brundidge say to

(Deposition of Toshikatsu Kodaira.)

you which led you to believe that he was looking for two witnesses?

Mr. DeWolfe: Objected to as hearsay.

The Court: Objection sustained.

(A. At the first session excuse me, the first meeting with Mr. Brundidge he repeatedly said, if I remember correctly, the way to say as two witnesses, Yagi and I saw her.)

Q. Is that all he said concerning two witnesses?

Mr. DeWolfe: Same objection, sir.

The Court: Same ruling.

(A. Yes.)

Q. And from that you gained the impression that he was looking for two witnesses?

Mr. DeWolfe: Same objection calling for a conclusion, likewise.

The Court: Objection sustained.

(A. That's right.)

Q. Do you recall that I asked you in one of the other depositions if you recall any further conversation between you and Brundidge, in which you answered, "No".

Mr. DeWolfe: Objected to as calling for hearsay.

The Court: Objection sustained.

Mr. Collins: Then, by Mr. Tamba: "I will stipulate that that was asked of the witness and that he answered "No".

Mr. DeWolfe: Move that that statement by Mr. Tamba go out.

(Deposition of Toshikatsu Kodaira.)

The Court: Objection sustained, let it go out.

Mr. Collins: Question by Mr. Tamba:

Q. Can you recall anything else that Mr. Brundidge said to you that you have not already given us in this deposition?

Mr. DeWolfe: Objected to as hearsay, sir.

The Court: Objection sustained.

(A. No, I don't think I can recall anything else at the moment.) [36]

Japan,
City of Tokyo,
American Consular Service—ss:

I do solemnly swear that I will truly and impartially take down in notes and faithfully transcribe the testimony of Toshikatsu Kodaira, a witness now to be examined. So help me God.

/s/ MILDRED MATZ.

Subscribed and sworn to before me this 23rd day of May, A.D. 1949.

/s/ THOMAS W. AINSWORTH,
Vice Consul of the
United States of America.

[American Consular Service Seal.]

. Service No. 964a; Tariff No. 38; No fee prescribed.

Japan,
City of Tokyo,
American Consular Service—ss:

CERTIFICATE

I, Thomas W. Ainsworth, Vice Consul of the United States of America in and for Tokyo, Japan, duly commissioned and qualified, acting under the authority of a certain stipulation for taking oral designations abroad, and upon order of the United States District Court, made and entered March 22, 1949, in the Matter of United States of America, Plaintiff, vs. Iva Ikuko Toguri D'Aquino, Defendant, pending in the Southern Division of the United States District Court, for the Northern District of California, and at issue between United States of America vs. Iva Ikuko Toguri D'Aquino, do hereby certify that in pursuance of the aforesaid stipulation and court order and at the request of Theodore Tamba, counsel for the defendant Iva Ikuko Toguri D'Aquino I examined Toshikatsu Kodaira, at my office in Room 335, Mitsui Main Bank Building, Tokyo, Japan, on the twenty-third day of May, A.D. 1949, on the twenty-eighth day of May, A.D. 1949, and on the second day of June, A.D. 1949, and that the said witness being to me personally known and known to me to be the same person named and described in the interrogatories, being by me first sworn to testify the truth, the whole truth, and nothing but the truth in answer to the several interrogatories and cross-interrogatories in

the cause in which the aforesaid stipulation, court order, and request for deposition issued, his evidence was taken down and transcribed under my direction by Mildred Matz, a stenographer who was by me first duly sworn truly and impartially to take down in notes and faithfully transcribe the testimony of the said witness Toshikatsu Kodaira, and after having been read over and corrected by him, was subscribed by him in my presence, and I further certify that I am not counsel or kin to any of the parties to this cause or in any manner interested in the result thereof.

In witness whereof, I have hereunto set my hand and seal of office at Tokyo, Japan, this second day of June, A.D. 1949.

/s/ THOMAS W. AINSWORTH,
Vice Consul of the
United States of America.

[American Consular Service Seal.]

Service No. 1096; Tariff No. 38; No fee prescribed.

[Endorsed]: Filed May 13, 1949.

In the Southern Division of the United States District Court for the Northern Division of California.

No. 31712 R

UNITED STATES OF AMERICA,

Plaintiff,

vs.

IVA IKUKO TOGURI D'AQUINO,

Defendant.

DEPOSITION OF J. A. ABRANCHES PINTO

Deposition of J. A. Abranches Pinto, taken before me, Thomas W. Ainsworth, Vice Consul of the United States of America, in Mitsui Main Bank Building, Room 335, in Tokyo, Japan, under the authority of a certain stipulation for taking oral designations abroad, and upon order of the United States District Court, made and entered March 22, 1949, in the Matter of the United States of America vs. Iva Ikuko Toguri D'Aquino, pending in the Southern Division of the United States District Court, for the Northern District of California, and at issue between the United States of America vs. Iva Ikuko Toguri D'Aquino.

The plaintiff, appearing by Frank J. Hennessy, United States District Attorney; Thomas DeWolfe, Special Assistant to the Attorney General, and Noel Storey, Special Assistant to the Attorney Gen-

eral, and the defendant, appearing by Wayne N. Collins and Theodore Tamba.

The said interrogations and answers to the witness thereto were taken stenographically by Mildred Matz and were then transcribed by her under my direction, and the said transcription being thereafter read over correctly to the said witness by me and then signed by said witness in my presence.

It is stipulated that all objections of each of the parties hereto, including the objections to the form of the questions propounded to the witness and to the relevancy, materiality and competency thereof, and the defendant's objections to the use of the deposition, or any part of the deposition, by plaintiff, on the plaintiff's case in chief, shall be reserved to the time of trial in this cause.

J. A. ABRANCHES PINTO

of Tokyo, Japan, Portuguese Consul in Tokyo, Japan, of lawful age, being by me duly sworn, deposes and says:

Direct Examination

By Mr. Tamba:

Q. Mr. Pinto, you are the consul for the Republic of Portugal in Tokyo, Japan? A. Yes.

Q. And you know Philip D'Aquino?

A. Yes.

Q. Is he a citizen and national of the Republic of Portugal? A. Yes, I consider him so.

Q. I am referring to the son, Philip D'Aquino?

(Deposition of J. A. Abranches Pinto.)

A. Yes, the son.

Q. I hand you a document dated April 4, 1944, and ask you what that is (document handed to witness)?

A. Yes, this is a certification of nationality of Filipe Jairus D'Aquino.

Q. Of whom? A. Portuguese nationality.

Q. Who is the person mentioned?

A. Filipe Jairus D'Aquino, the husband of Toguri D'Aquino, and this is the usual document for Portuguese citizens in Japan.

Mr. Tamba: I offer this document as defendant's exhibit "1" in Pinto deposition.

Q. Mr. Pinto, did you attend the wedding of Philip D'Aquino and Iva Toguri D'Aquino at Sophia University? A. Yes.

Q. And you were Mr. D'Aquino's best man, as I recall?

A. Well, I signed the registration papers.

Q. At the church?

A. At the church I signed it. As a witness, or best man, if you call it that, but of course in a private capacity.

Q. Not official capacity?

A. Not official capacity.

Q. I hand you a document dated June 18, 1945, and ask you what that is, Mr. Pinto (document shown to witness).

A. After they registered the marriage in the Portuguese Consulate I posted this little bulletin to certify that they have married and registered

(Deposition of J. A. Abranches Pinto.)

the marriage in the Portuguese Consulate.

Mr. Tamba: I offer this document in evidence as defendant's exhibit "2" in Pinto deposition.

Q. I am now referring to exhibit "1" which was offered, and ask you is that your signature at the bottom of that document? A. Yes.

Q. Is that the seal of your government?

A. Yes.

Q. I now refer to exhibit "2" which I offered, and ask you if that is your signature appearing thereon? A. Yes. [3*]

Q. And that is the seal of your government which appears on it? A. Yes.

Q. I hand you a document dated November 4, 1948, Mr. Pinto, and ask you what that document is (document shown to witness).

A. This is a transcription from the books in the Portuguese Consulate of the marriage of D'Aquino and Toguri D'Aquino in the Catholic Church. It is in the Portuguese Consulate books and this is a full transcription.

Q. That is your signature on the second page at the bottom of the document? A. Yes.

Q. And that is the seal of your government on this document? A. Yes.

Mr. Tamba: I offer this document, together with the English translation, which the witness has read, in evidence as defendant's exhibit "3" in Pinto deposition.

* Page numbering appearing at bottom of page of original Reporter's Transcript.

(Deposition of J. A. Abranches Pinto.)

Q. Mr. Pinto, I hand you a document dated November 4, 1948, and ask you what that document is? (Witness shown document.)

A. This is the document which certifies that Mr. Filipe D'Aquino is a Portuguese citizen.

Q. And he was born when?

A. I don't know why he asked for such a document.

Q. Is that your signature on this paper?

A. Yes.

Q. And that is the seal of your government on this paper? A. Yes.

Mr. Tamba: I offer this document in evidence as defendant's exhibit "4" in Pinto deposition.

Q. I hand you another document, Mr. Pinto, dated November 4, 1948, [4] and ask you what that is (witness shown document).

A. I suppose Mr. D'Aquino asked me for a legal certificate of his registration in the Portuguese Consulate when he was born. All the documents in the Portuguese Consulate in Yokohama were lost in 1923 in the big earthquake. Then, of course I could not pass such a document. Could not give him. Then I certified that such a thing happened and it is impossible to furnish a certificate of registration of birth of Filipe D'Aquino, married, born in Yokohama on 26 March, 1921, son of Jose Filomeno D'Aquino and Maria D'Aquino. I cannot pass the document because it was burned. I cannot pass the document. Orig-

(Deposition of J. A. Abranches Pinto.)

inal document I cannot furnish. Copy of the original document I cannot furnish because the books were lost.

Q. When you use the word "pass" you mean you cannot deliver the document because it was destroyed in the fire?

Mr. Tamba: I offer this document together with English translation thereof as defendant's exhibit "5" in Pinto deposition.

Q. By the way, Mr. Pinto, is that your signature at the bottom of this document, exhibit "5"?

A. Yes.

Q. And the seal thereon is the seal of your government?

A. Yes.

Q. Mr. Pinto, this exhibit which I refer to as exhibit "5" with the translation, is in lieu of a birth certificate because the birth certificate was destroyed?

A. Yes.

Q. Now, Mr. Pinto, I show you document dated 10 September, 1946, and ask you if the signature appearing on the right-hand of that is your signature? (Document shown to witness.)

A. Yes.

Q. And the seal of your country? [5]

A. Yes.

Q. Whose signature is that on the left-hand side?

A. Mrs. Toguri D'Aquino.

Q. She signed that Ikuko Toguri D'Aquino.

A. Yes.

Mr. Tamba: I offer this document as defend-

(Deposition of J. A. Abranches Pinto.)

ant's exhibit "6" in Pinto deposition, together with English translation thereof.

Q. And that (referring to exhibit "6") is a certificate of registration of Ikuko Toguri D'Aquino with the Portuguese Consul in Tokyo, Japan, on 10 September, 1946? A. Yes.

Q. I hand you another document, Mr. Pinto, dated 20 June, 1945, is that your signature on the right hand side (witness shown document)?

A. Yes.

Q. And this is the seal of your country on this document? A. Yes.

Q. To the left of your signature there is another one, whose signature is that?

A. Ikuko Toguri D'Aquino.

Q. Signed in your presence? A. Yes.

Q. Registered in your office? A. Yes.

Q. This document together with the one which I just showed you as defendant's exhibit "6," these contain photographs of Mrs. D'Aquino?

A. Yes.

Mr. Tamba: I offer this document as defendant's exhibit "7" in Pinto deposition. [6]

Q. I now hand you another document dated June 30th, 1947, and ask you what that is. (Document exhibited to witness.)

A. Certificate of registration of Filipe Jairus D'Aquino.

Q. Is this your signature on the document (indicating)? A. Yes.

(Deposition of J. A. Abranches Pinto.)

Q. And the seal of your government appears on it? A. Yes.

Q. And the signature of Filipe J. D'Aquino?

A. Yes.

Mr. Tamba: I offer this document, together with a translation thereof, in evidence as defendant's exhibit No. "8" in Pinto deposition.

Q. Exhibit "1" which we offered in this deposition, what is that document, Mr. Pinto? What is this document? Tell us for the purpose of the record?

A. Certificate of nationality of Filipe Jairus D'Aquino as a Portuguese citizen.

Q. Referring to Exhibit "6" in this deposition, what is that, sir?

A. Certificate of Portuguese nationality of Ikuko Toguri D'Aquino by marriage with Filipe Jairus D'Aquino, as a Portuguese citizen, bears date 10 September, 1946.

Q. Exhibit "7," what is that, sir?

A. Certificate of nationality of Toguri D'Aquino as a Portuguese citizen.

Q. That is by virtue of marriage with a Portuguese citizen, Filipe D'Aquino? A. Yes.

Q. And that has your signature?

A. Marriage with Portuguese citizen, Filipe Jairus D'Aquino.

Q. Dated June 20, 1945? A. Yes.

Q. Mr. Pinto, how long have you been a resident of Japan? [7]

(Deposition of J. A. Abranches Pinto.)

A. I have been in Japan for thirty-two years.

Q. And you have been Portuguese Consul for how many years?

A. I think I have been Consul since I come to Japan in 1917 up to I am not sure but I think up to middle of 1921 and after that I left the Consulate for a while, I don't know how many years, but I think about five years maybe, and after five years the Consulate in Yokohama was vacated, see, and the Portuguese Minister here asked me again to become the Consul for Portuguese and I said on condition that the Consulate be moved to Tokyo because I was living in Tokyo. Then I became Consul for Portuguese up to now. I think from 1926 maybe I became Consul in Tokyo, or '25, I am not sure.

Q. And you have been Portuguese Consul in Tokyo ever since 1925 or '26 up to the present time? A. Yes.

Q. As Portuguese Consul have you had occasion to familiarize yourself with regard to the laws of Portugal with reference to registration of citizens and acquisition of Portuguese nationality?

A. Yes.

Q. You have acquired that through your experience as a Portuguese Consul? A. Yes.

Q. Your experience on that subject of the law has been acquired by reading Portuguese law books and from your experience as Portuguese Consul?

A. Yes.

(Deposition of J. A. Abranches Pinto.)

Q. Will you state, Mr. Pinto, whether or not according to the law of Portugal the marriage of an adult woman citizen of the United States to an adult male Portuguese citizen in Tokyo, Japan, on April 19, 1945, in and of itself conferred upon that woman the nationality and citizenship of Portugal? A. Yes. [8]

Q. It did?

A. Yes, according to Portuguese law, yes.

Q. Will you state whether or not according to the law of Portugal the formal registration of such a marriage by such husband and wife or by either of them at the Consulate of Portugal in Tokyo, Japan, constituted a formal acquisition of Portuguese nationality by said woman, or by the wife?

A. Yes.

Q. It did? A. Yes.

Q. Mr. Pinto, Mrs. Iva Toguri D'Aquino was born in California of Japanese parents?

A. Yes.

Q. And in consequence was a **citizen** of the United States by birth? A. Yes.

Q. In July, 1941, she left the United States?

A. Yes.

Q. She took up residence in Tokyo, Japan?

A. Yes.

Q. Thereafter she was united, she was married on April 19, 1945, at Tokyo, Japan, according to the rites of the Roman Catholic Church at Sophia University Chapel, to Philip D'Aquino, a national

(Deposition of J. A. Abranches Pinto.)

and citizen of Portugal residing in Japan, who is one-fourth Portuguese and three-fourths Japanese blood? A. Yes.

Q. Can you state whether or not according to the law of Portugal by virtue of said marriage, in and of itself, she then and there became a national and citizen of Portugal? A. Yes.

Q. She did become a national and citizen of Portugal? A. Yes.

Q. Have you the Portuguese law on that subject with you? A. Yes. [9]

Q. May we see the books, sir?

A. (Witness produces two books, which he consults.) This is the Civil Code. This article, Article 18 of the Code, has been modified.

Q. Where does it provide that Mrs. D'Aquino became a Portuguese citizen? A. Where?

Q. Where in the book?

A. Article 18, Portuguese Citizens.

Q. Don't read any of the paragraphs in that book other than those which apply to her.

A. (Witness reads.) "No. 6. The foreign woman who marries with a Portuguese citizen * * *"

Q. Becomes a citizen and national of Portugal?

A. The new one is the same, yes. (Witness reads from book.) "The foreign woman that marries with a Portuguese citizen * * *"

Q. She becomes a citizen and national of Portugal? A. Yes.

(Deposition of J. A. Abranches Pinto.)

Q. I want to ask you another question. That woman acquires Portuguese citizenship by virtue of the fact that she is married outside of the United States?

A. Even if she married in the United States she would become a Portuguese citizen.

Q. But she could not claim the benefits of the Portuguese law had she married in the United States? A. Yes, she could not.

Q. But because she married in Japan to a Portuguese citizen she can claim the benefit of the Portuguese law? A. Yes.

Q. Incidentally, are you familiar with Machado Villela? A. Yes.

Q. Who is he? [10]

A. Well, he was a lawyer, or a teacher of law, and is a well known international lawyer.

Q. He is a Portuguese international lawyer?

A. Yes.

Q. He published a book in 1921? A. Yes.

A. That book is *Tratado Elementar de Direito Internacional Privado*? A. Yes.

Q. And the opinion you have expressed here this morning is confirmed in that book?

A. What is that?

Q. The opinion which you expressed here is confirmed by Mr. Villela?

A. Is according to the *Tratado Elementar de Direito Internacional Privado*.

Q. For the purpose of the record, the Book

(Deposition of J. A. Abranches Pinto.)

No. 1 published in 1921, paragraph 38, page 116, you delivered the book to the Minister and it is in the Minister's office? A. Yes.

Cross-Examination

By Mr. Storey:

Q. Mr. Pinto, who is the chief of the Ministry of the Portuguese Government in Tokyo, Japan?

A. Mr. Franco Nogueira.

Q. Are you familiar with Mr. Nogueira's signature? A. Yes.

Q. I hand you a document, Mr. Pinto, which is offered as Government's Exhibit "1," in connection with this deposition, and ask you if you can identify the signature appearing on this document?

Mr. Tamba: Document is objected to upon the ground that no proper foundation has been laid, and constitutes hearsay. [11]

Q. Is that Mr. Nogueira's signature on the document referred to?

A. Yes. Excuse me, well, of course it is his signature but usually he writes his signature complete: "Franco Nogueira." Here, in Portuguese, we call it rubrica only. Of course it is his rubrica but usually he signs it Franco Nogueira. At least that is the signature I know.

Q. Is that (pointing to seal on Government's exhibit "1") the official seal of the Portuguese Legation on the bottom? A. Yes.

(Deposition of J. A. Abranches Pinto.)

Q. Has Mr. Nogueira ever discussed the citizenship of Mrs. Iva D'Aquino with you?

A. He has with me sometimes, yes, especially later, course.

Q. Is Mr. Nogueira an attorney by profession in Portugal?

A. Well, of course, he has the law course in Portugal, but I don't know if he was. I suppose he was for a short time, I think so.

Q. Do you know of your own knowledge that he was?

A. Actually at present I don't know. Naturally he can be if he likes to be, he can be a lawyer in Portugal.

Q. Has Mr. Nogueira been trained in the legal profession in Portugal? A. Yes.

Q. Has Mr. Nogueira finished all the educational requirements to become an attorney?

A. Yes.

Q. To your own knowledge do you know if Nogueira is a member of the bar?

A. This I don't know. I am not sure.

Q. In your discussions with Mr. Nogueira concerning the citizenship of Mrs. D'Aquino, has he informed you that there is some controversy—

A. Yes, he did.

Q. Concerning the fact that Philip D'Aquino is a Portugal national? [12]

A. There is some doubt about the father's nationality. Of course if the father is not a Portu-

(Deposition of J. A. Abranches Pinto.)

guess the son will not be a Portuguese, but——

Q. And at the present time is there an investigation going on concerning the nationality of Mr. Philip D'Aquino?

A. Yes, the father D'Aquino.

Q. When Mrs. D'Aquino was married to Philip D'Aquino, you have testified, she acquired Portuguese citizenship? A. Yes.

Q. At that time did she lose her American citizenship?

A. I don't know, according to the American law.

Q. Did Mrs. D'Aquino discuss with you at the time she proposed to be married to Philip D'Aquino the possibility of losing her American citizenship?

A. No.

Q. As a result of this marriage?

A. No, we did not discuss it at that time.

Q. Mr. Pinto, was Mr. Nogueira a witness to the marriage? A. No, he was not in Japan.

Q. Has Mr. Nogueira asked you since the war if Mrs. D'Aquino had a conversation with you before she was married as to whether or not she would lose her American citizenship if she married Philip D'Aquino?

A. Since the war? You mean when the war started?

Q. Since the war has been over?

A. If I had some conversation——

Q. With Mr. Nogueira about the loss of the

(Deposition of J. A. Abranches Pinto.)

American citizenship of Mrs. D'Aquino in the event she married Mr. D'Aquino?

A. Of course, when the question of Mrs. D'Aquino as Tokyo Rose began, sometimes the question is, "is she a Portuguese citizen while she is married to D'Aquino; he is a Portuguese citizen, of course; she is a Portuguese because she was married with [13] D'Aquino in June, 1945."

Q. You are positive that Mrs. D'Aquino did not discuss with you prior to the time she married Philip D'Aquino the possibility of losing her American citizenship in the event she were married to Mr. D'Aquino?

A. No. I think about nationality we discussed nothing at that time but, of course, I think when they were married they knew that she became a Portuguese citizen. It is according to Portuguese law that any Portuguese marries with a foreigner that foreigner becomes a Portuguese. It is a fact.

Q. Did Mrs. D'Aquino tell you she wanted to retain her American citizenship when she married D'Aquino?

A. She did not tell anything about that. She told me her nationality and I told her it is written in the marriage document the place she was born and her American citizenship—

Q. And you gave Mrs. D'Aquino no advice whatever as to the loss of her American citizenship as a result of this marriage?

A. I have no idea to inform her on that.

(Deposition of J. A. Abranches Pinto.)

Mr. Storey: I want to make sure the record states that I reserve objection to the documents introduced into evidence in connection with this deposition, until the time of trial.

Redirect Examination

By Mr. Tamba:

Q. You have known Philip D'Aquino's father for many years? A. Yes.

Q. And you know he is a Portuguese citizen and national? A. Yes.

Q. The records of his registration have been destroyed, is that correct? A. Yes.

Q. Where, in what office?

A. In Portuguese Consulate in Yokohama. [14]

Q. He is presently registered in your office as a national and citizen of Portugal?

A. The father?

Q. Yes.

A. The father was registered already, when I arrived in Japan.

Q. Registered and known as a Portuguese citizen and national?

A. Yes, when I arrived.

Q. In Yokohama? A. Yes.

Q. That office was destroyed by an earthquake?

A. Yes.

Q. And you know that of your own knowledge?

A. Yes.

(Deposition of J. A. Abranches Pinto.)

Q. And he is presently registered in your office?

A. Registered in 1923 by the former Consul.

Q. He is registered now in your office?

A. Yes, in my office.

Q. Mr. Storey has referred to a document, which is marked Government's Exhibit "1," that does not change your opinion in any wise, does it?

A. No.

Q. And that is, if she were (voluntarily) living in America, or if she had married there it would be a different situation than if she was married in Japan?

A. No, it does not change my opinion.

/s/ J. A. ABRANCHES PINTO.

Japan,

City of Tokyo

American Consular Service—ss.

I do solemnly swear that I will truly and impartially take down in notes and faithfully transcribe the testimony of J. A. Abranches Pinto, a witness now to be examined. So help me God.

/s/ MILDRED MATZ.

Subscribed and sworn to before me this 13th day of May, A.D. 1949.

/s/ THOMAS W. AINSWORTH,

Vice Consul of the

United States of America.

[American Consular Service Seal.]

Service No. 876a; Tariff No. 38; No fee prescribed.

Japan,
City of Tokyo,
American Consular Service—ss.

CERTIFICATE

I, Thomas W. Ainsworth, Vice Consul of the United States of America in and for Tokyo, Japan, duly commissioned and qualified, acting under the authority of a certain stipulation for taking oral designations abroad and upon order of the United States District Court, made and entered March 22, 1949, in the Matter of United States of America, Plaintiff, vs. Iva Ikuko Toguri D'Aquino, Defendant, pending in the Southern Division of the United States District Court, for the Northern District of California, and at issue between United States of America vs. Iva Ikuko Toguri D'Aquino, do hereby certify that in pursuance of the aforesaid stipulation and court order and at the request of Theodore Tamba, counsel for the defendant Iva Ikuko Toguri D'Aquino, I examined J. A. Abranches Pinto, at my office in Room 335, Mitsui Main Bank Building, Tokyo, Japan, on the thirteenth day of May, A.D. 1949, and that the said witness being to me personally known and known to me to be the same person named and described in the interrogatories, being by me first sworn to testify the truth, the whole truth, and nothing but the truth in answer to the several interrogatories and cross-interrogatories in the cause in which the

aforesaid stipulation, court order, and request for deposition issued, his evidence was taken down and transcribed under my direction by Mildred Matz, a stenographer, who was by me first duly sworn truly and impartially to take down in notes and faithfully transcribe the testimony of the said witness J. A. Abranches Pinto, and after having read over and corrected by him, was subscribed by him in my presence; and I further certify that I am not counsel or kin to any of the parties to this cause or in any manner interested in the result thereof.

In witness whereof, I have hereunto set my hand and seal of office at Tokyo, Japan, this 26th day of May, A.D. 1949.

/s/ THOMAS W. AINSWORTH,
Vice Consul of the
United States of America.

[American Consular Service Seal.]

Service No. 998; Tariff No. 38; No fee prescribed.

[Endorsed]: Filed June 9, 1949.

DEFENDANT'S EXHIBIT NO. 1
IN PINTO DEPOSITION

(Translation)

Consulate of Portugal
(Coat of Arms)

Tokyo

Service of the Portuguese Republic
Certificate of Consular Registry No. 90

The Consul of the Portuguese Republic in Tokyo,

Makes it known that Felipe Jairus D'Aquino; Marital status single (Note of translator: The word "single" was lined out and replaced by pencil writing "married"), profession, newspaperman, son of Jose Filomeno d'Aquino and of Maria d'Aquino, born on the 26th day of March of 1921, a native of Yokohama, is a Portuguese citizen and is duly registered in the Register of this Consulate under No. 5 of Book No. 1 of inscriptions.

His last residence was Yokohama and he arrived on (date in blank) at this consular district.

He resides in Tokyo, 4 Tamuracho, 6-chome, Shiba-ku.

He proved his identity by consular inscription.

Portuguese Consulate in Tokyo, on April 4, 1944.

Signature of the person being
registered,

/s/ F. D'AQUINO.

/s/ J. A. ABRANCHES PINTO,
Consul.

(Rubber Stamp): Consulate of Portugal—Tokyo.
(Photograph).

(Rubber Stamp): Consulate of Portugal—Tokyo.

Characteristics: Height, 1,65 meters; Hair, black; Face, oval; Beard, has not; Eyes, brown; Nose, regular; Mouth, regular; Color, white..

This certificate is valid for the period of one year.

(Stamp): Portuguese Republic 12\$00 (escudos)
Consular Service.

(Rubber Stamp): Consulate of Portugal—Tokyo.

Paid at the rate of 0.20 the amount of Y 2.40 in accordance with Item No. 1 of the table of rates, this amount being entered in the book of entries under No. 1615. Tokyo, April 4, 1944.

/s/ A. PINTO.

(Rubber Stamp): American Consular Service,
Tokyo, Japan.

/s/ THOMAS W. AINSWORTH
American Vice Consul.

On the back:

“Revalidated for the period of two years until April 3, 1947. Portuguese Consulate in Tokyo, June 21, 1945.”

/s/ J. A. ABRANCHES PINTO.

(Rubber Stamp): Consulate of Portugal, Tokyo.

(Rubber Stamp): Gratis.

Translator's affidavit attached.

U. S. Consular Service certificate attached.

[Endorsed]: Filed Sept. 2, 1949. U. S. D. C.
Defts. Ex. EE.

DEFENDANT'S EXHIBIT NO. 2
IN PINTO DEPOSITION
(Translation)

Consulate of Portugal
(Coat of Arms)

Marriage Certificate

On the 18th day of June, 1945, was transcribed at this Consulate the marriage, celebrated in con-

formity with the canonic laws, of Felipe J. D'Aquino, a native of Yokohama, Japan, son of Jose Filomeno D'Aquino and of Maria D'Aquino with Ikuko Toguri D'Aquino, a native of Los Angeles, California, daughter of Jun Toguri and of Fumi Toguri.

Consulate of Portugal in Tokyo, on the 18th day of June, 1945.

/s/ J. A. ABRANCHES PINTO,
Consul.

(Rubber Stamp): Consulate of Portugal—Tokyo.

/s/ THOMAS W. AINSWORTH,
American Vice Consul.

(Rubber Stamp): American Consular Service,
Tokyo, Japan.

Translator's affidavit attached.

U. S. Consular Service certificate attached.

[Endorsed]: Filed Sept. 2, 1949. U. S. D. C.
Defts. Ex. FF.

DEFENDANT'S EXHIBIT NO. 3 IN PINTO DEPOSITION

(Translation)

Consulate of Portugal
Tokyo

I, Joao do Amaral Abranches Pinto, Consul of Portugal in Tokyo, Japan. Do hereby certify that in the book of records and transcriptions of marriages of this Consulate of Portugal in Tokyo,

on the back of page seven, page eight and back, there appears the record of marriage as follows:
.....Record No. 5—At the request of Filipe Jairus Testus d'Aquino, I, Joao do Amaral Ab-ranches Pinto, Consul of Portugal in Tokyo, transcribe hereunder the following record of marriage, performed in conformity with the canonic laws of the Catholic Chapel annexed to Sophia University of Tokyo, in Kojimachi-ku, Tokyo, on the nineteenth day of the month of April, in the year nineteen hundred and forty-five, before the Reverend Father J. B. Kraus, S.J.....
On the nineteenth day of the month of April in the year nineteen hundred and forty-five, in the chapel annexed to the Catholic Sophia University of Tokyo, in Kojimachi-ku, Tokyo, before the Reverend Father J. B. Kraus, S.J. the following performed their marriage: the bridegroom Filipe Jairus Testus d'Aquino, newspaperman, residing in this capital, single, a native of Yokohama, Japan, born on the twenty-sixth day of March, in the year nineteen hundred and twenty-one, legitimate son of Jose Filomeno d'Aquino and Maria d'Aquino, and the bride: Ikuko Toguri, residing in this capital, single, North-American citizen, a native of Los Angeles, California, United States of North America, born on the fourth day of July, in the year nineteen hundred and eighteen, legitimate daughter of Jun Toguri and Fumi Toguri, her name becoming Ikuko Toguri d'Aquino.....
And for the records, I transcribe this marriage rec-

ord in accordance with the terms of Article 36 of Decree Number 29970, published in the Government Diary Number 240 of October 13, of the year 1939, and in the Portuguese Civil Code, on presentation of the proofs, which are annexed to this record at the request of the bridegroom. Consulate of Portugal in Tokyo, on the eighteenth day of the Month of June, in the year nineteen hundred and forty-five.

/s/ J. A. ABRANCHES PINTO,
Consul.

/s/ THOMAS W. AINSWORTH,
American Vice Consul.

[(Stamped): American Consular Service.]

There follows the receipt of consular emoluments. Paid at the rate of exchange of 0.20 the amount of Forty Escudos (y 8.00) in accordance with item 20 of the table of rates, this amount being entered in the book of entries under No. 1620. Tokyo, June 18, 1945.—Signed, A. Pinto.—Fiscal stamp of the Consular Service duly authenticated by a rubber stamp reading: Consulate of Portugal—Tokyo..... Nothing else appearing in the record that I am consulting, I issued these presents, to which is affixed a stamp of this Consulate, signed by me on the fourth day of the month of November, in the year nineteen hundred and forty-eight.....

Consulate of Portugal in Tokyo, on November 4, 1948.

/s/ J. A. ABRANCHES PINTO,
Consul.

(Rubber stamp): Consulate of Portugal—Tokyo.

(Stamp): (Portuguese Republic, 40\$00, Consular Service.)

(Rubber stamp): Paid at the rate of 11.00 the amount of Y440.00 (Escudos 40\$00) in accordance with item 25 of the table of rates, this amount being entered in the book of entries under number 258. Tokyo, November 4, 1918.

/s/ A. PINTO.

THOMAS W. AINSWORTH,
American Vice Consul.

(Stamped): American Consular Service.

(Consular Seal over wax.)

U. S. Consular Service Certificate attached.

[Endorsed]: Filed Sept. 2, 1949. U.S.D.C. Defts.
Ex. GG.

DEFENDANT'S EXHIBIT NO. 4 IN PINTO
DEPOSITION

Portuguese Consulate
Tokyo

To whom it may concern,

This is to certify that, Mr. Filipe Jairus d'Aquino, born in Yokohama on 26th March, 1921, married to Mrs. Ikuko Toguri d'Aquino, is a Portuguese national duly registered in this Consulate.

Portuguese Consulate in Tokyo, 4th November, 1948.

/s/ J. A. ABRANCHES PINTO.

(Rubber Stamp): Consulate of Portugal—Tokyo.

(Stamp): Portuguese Republic 25:00 (escudos)
Consular Service.

/s/ THOMAS AINSWORTH,
American Vice Consul.

(Stamp): American Consular Service.

American Consular Service certificate attached.

[Endorsed]: Filed Sept. 2, 1949. U. S. D. C.
Defts. Ex. HH.

DEFENDANT'S EXHIBIT NO. 5 IN PINTO DEPOSITION

(Translation)

Consulate of Portugal
Tokyo

Affidavit

I, Joao do Amaral Abranches Pinto, Consul of
Portugal in Tokyo.....
Upon request and because it is the truth and to
whom it may concern, do hereby certify that, the
books and documents belonging to the files of the
Consulate of Portugal in Yokohama having been
destroyed on the occasion of the earthquake and
subsequent fire of September 1, in the year 1923, it
is not possible to furnish the record of birth cer-
tificate of Filipe Jairus d'Aquino, married, born in
Yokohama on March 26, 1921, son of Jose Filomeno
d'Aquino and Maria d'Aquino.....

Consulate of Portugal in Tokyo, November 4, 1948.

The Consul,

/s/ J. A. ABRANCHES PINTO.

(Rubber Stamp): Consulate of Portugal—
Tokyo.

(Stamp): Portuguese Republic 25\$00 Consular
Service.

(Rubber stamp): Paid at the rate of 11.00 the
amount of Y275.00 (Escudos 25\$00) in accordance
with item 26 of the table of rates, this amount being
entered in the book of entries under No. 257.
Tokyo, November 4, 1948.

/s/ A. PINTO.

/s/ THOMAS W. AINSWORTH,
American Vice Consul.

(Stamp): American Consular Service.

Translator's affidavit attached.

American Consular Service Certificate attached.

[Endorsed]: Filed Sept. 2, 1949. U.S.D.C. Defts.
Ex. II.

DEFENDANT'S EXHIBIT NO. 6 IN PINTO
DEPOSITION
(Translation)

Consulate of Portugal
(Coat of Arms)
Tokyo

Service of the Portuguese Republic
Certificate of Consular Registry No. 159

The Consul of the Portuguese Republic in Tokyo

makes it known that Ikuko Toguri d'Aquino (by marriage to Filipe J. d'Aquino) marital status, married, profession, newspaperwoman, daughter of Jun Toguri and Fumi Toguri, born on July 4, 1918, a native of Los Angeles, California, is a Portuguese citizen and is duly registered in the Register of this Consulate under No. 5 of Book No. 1 of inscriptions.

Her last residence was in (blank) and she arrived in (date blank) at this consular district.

She resides in Setagaya-ku, Ikejirimachi, No. 396.

She proved her identity by previous consular certificate.

Consulate of Portugal in Tokyo, on September 10, 1946.

/s/ IKUKO TOGURI D'AQUINO,
Signature of the person being
registered.

/s/ J. A. ABRANCHES PINTO,
Consul.

(Rubber stamp): Consulate of Portugal—Tokyo.

(Photograph.)

Characteristics: Blank.

This certificate is valid for the period of one year.

(Stamp): Portuguese Republic 12\$00 Consular Service.

Paid at the rate of 0.20 the amount of Y2.40 in accordance with Item No. 1 of the table of rates,

this amount being entered in the book of entries under No. 1694. Tokyo, September 10, 1946.

/s/ A. PINTO.

/s/ THOMAS W. AINSWORTH,
American Vice Consul.

(Stamp): American Consular Service.

Translator's affidavit attached.

American Consular Service certificate attached.

[Endorsed]: Filed Sept. 2, 1949. U.S.D.C. Defts.
Ex. JJ.

DEFENDANT'S EXHIBIT NO. 8 IN PINTO
DEPOSITION

(Translation)

(Coat of Arms)

Consulate of Portugal
Tokyo

Service of the Portuguese Republic
Certificate of Consular Registry No. 190

The Consul of the Portuguese Republic in Tokyo makes it known that Filipe Jairus d'Aquino, marital status, married, profession, newspaperman, son of Jose Filomeno d'Aquino and Maria d'Aquino born on the 26th day of March, 1921, a native of Yokohama, is a Portuguese citizen and is duly registered in the Register of this Consulate under No. 5 of Book No. 1 of inscriptions, his last residence was Yokohama, and he arrived on (date in blank) at this consular district.

He resides in Tokyo, Setagaya-ku, 396 Ikejirimachi.

He proved his identity by previous consular certificate. Consulate of Portugal in Tokyo, on June 30, 1947.

/s/ FILIPE J. D'AQUINO,

Signature of the person being
registered.

/s/ J. A. ABRANCHES PINTO,
Consul.

(Photograph.)

(Rubber Stamp): Consulate of Portugal—Tokyo.

Characteristics: Blank.

This certificate is valid for the period of one year.

(Stamp): Portuguese Republic 12\$00 Consular
Service.

Paid at the rate of 0.80 the amount of Y9.60 in accordance with Item 1 of the table of rates, this amount being entered in the book of entries under No. 1753. Tokyo, June 30, 1947.

/s/ A. PINTO.

/s/ THOMAS W. AINSWORTH,
American Vice Consul.

American Consular Service certificate attached.

[Endorsed]: Filed Sept. 2, 1949. U.S.D.C. Defts.
Ex. LL.

GOVERNMENT'S EXHIBIT "I"
IN PINTO DEPOSITION

Consulate of Portugal

Tokyo, April 28, 1949.

No. 21

Proc. 2,2

Memorandum

Reference is made to the Diplomatic Section's memorandum of January 27th, 1949, concerning the nationality of Mrs. Iva Toguri de Aquino.

2. The Portuguese Diplomatic Agency wishes to advise the Section that, regardless of the fact that Mrs. Aquino could eventually have acquired the Portuguese citizenship by marriage (which in this case is a doubtful point still under investigation), she may not claim the Portuguese nationality while living in a country whose laws might also consider her as its national.

3. For further information, the Agency invites the Section's attention to the Portuguese Code of Civil Law which in its article 18 § 3 includes the above provision.

/s/ F. POY.

[Stamped]: Consulate of Portugal.

Tokyo, April 28th, 1949.

/s/ THOMAS W. AINSWORTH,
American Vice Consul.

(Stamped): American Consular Service.

[Endorsed]: Filed Sept. 2, 1949. U.S.D.C. U.S.
Ex. 71.

In the Southern Division of the United States
District Court for the Northern District of
California

No. 31712 R

UNITED STATES OF AMERICA,
Plaintiff,

vs.

IVA IKUKO TOGURI D'AQUINO,
Defendant.

DEPOSITION OF HEINRICH DUMOULIN

Deposition of Heinrich Dumoulin, taken before me, Thomas W. Ainsworth, Vice Consul of the United States of America, in Mitsui Main Bank Building, Room 335, in Tokyo, Japan, under the authority of a certain stipulation for taking oral designations abroad, and upon order of the United States District Court, made and entered March 22, 1949, in the Matter of the United States of America vs. Iva Ikuko Toguri D'Aquino, pending in the Southern Division of the United States District Court, for the Northern District of California, and at issue between the United States of America vs. Iva Ikuko Toguri D'Aquino.

The plaintiff appearing by Frank J. Hennessy, United States District Attorney; Thomas DeWolfe, Special Assistant to the Attorney General, and Noel Storey, Special Assistant to the Attorney General, and the defendant, appearing by Wayne N. Collins and Theodore Tamba.

The said interrogations and answers to the witness thereto were taken stenographically by Mildred Matz and were then transcribed by her under my direction, and the said transcription being thereafter read over correctly to the said witness by me and then signed by said witness in my presence.

It was orally stipulated between Mr. Tamba of the defense, and Mr. Storey of the prosecution, that the administering of the oath to the witness was waived.

It is Stipulated that all objections of each of the parties hereto, including the objections to the form of the questions propounded to the witness and to the relevancy, materiality and competency thereof, and the defendant's objections to the use of the deposition, or any part of the deposition, by plaintiff, on the plaintiff's case in chief, shall be reserved to the time of trial in this cause.

HEINRICH DUMOULIN

of Tokyo, Japan, of lawful age, testified as follows:

Direct Examination

By Mr. Tamba:

Q. Father Dumoulin, what is your full name?

A. Heinrich Dumoulin.

Q. And, Father, do you belong to the Society of Jesus?

A. Yes, I am a Jesuit.

Q. You are presently with the Sophia University in Tokyo?

A. Yes, staying at Sophia University as professor.

(Deposition of Heinrich Dumoulin.)

Q. What subjects do you teach at Sophia University?

A. Philosophy, and now religion.

Q. How long have you been with Sophia University?

A. I am staying at Sophia from the beginning of my stay in Japan, that is to say from 1935, and I belong to the staff of the University, but I don't remember that date.

Q. Father, you know a person by the name of Iva Toguri, also known as Iva D'Aquino? [2*]

A. Yes, Toguri—Ikuko, I know her. A person called Ikuko Toguri.

Q. Did she come to see you sometime in the year 1945, Father Dumoulin?

A. Yes, she came to see me together with Philip D'Aquino, asking me to—explaining to me their situation, and their desire to be married in the Catholic Church. Mr. D'Aquino had been a Catholic. He was a Catholic, and so they wanted to be married at the Catholic Church, and she wanted to become a Catholic, to be instructed and baptized before. I do not remember exactly what we talked about together but I know I came to the conclusion that the best way to do would be to have her instructed by a Father who could give the instruction in English. I, myself, was replacing at the time Father Heuvers, the parish priest of St. Theresa. He was the parish priest of the church and, as he was ill, I was replacing him. As I, myself, did not know

* Page numbering appearing at bottom of page of original Reporter's Transcript.

(Deposition of Heinrich Dumoulin.)

sufficient English I found that it would be better that she would be instructed by a Father who could give the instruction in English. I think she spoke Japanese but as she spoke English better than Japanese I came to the conclusion that it would be easier to have her instructed in English. I do not remember to what extent she was able to speak Japanese. I called Father Kraus, who speaks English perfectly, and Father Kraus gave the instructions and he was able to baptize her, if I am not mistaken one or two days before the marriage. (Witness consults paper purporting to be a baptismal certificate.) Yes, baptized the 18th of April and she was married on the 19th.

Q. Father, did you prepare the church for the marriage?

A. No, I don't remember it. It must have been the lay brother.

Q. Were you present at the marriage ceremony?

A. I was present later on in the parlor. We signed the documents and I saw the couple and I felicitated them. I remember that quite well that I saw them and felicitated them after the marriage, and I may say this (witness consults photostatic copy of purported marriage certificate), I may say, is the signature of Father Kraus. It is very characteristic of Father Kraus' handwriting to anybody who knew him.

Q. May I ask you where Father Kraus is today?

A. He died in 1946, I think in March. The day you can, of course, find out.

(Deposition of Heinrich Dumoulin.)

Q. What is this that you refer to as having Father Kraus' signature?

A. That is written by Father Kraus.

Q. The certificate of marriage?

A. Yes, and this is the signature of Father Kraus. Quite characteristic and anyone who knew him, I am sure, can tell his signature.

Mr. Tamba: May I offer this document in evidence. It is the certificate of marriage dated April 19, 1945, and I offer it in evidence as defendant's Exhibit "I." It is a photostatic copy.

Mr. Storey: No objection.

Q. May I show you a photostatic copy of another document (counsel hands document to witness), and ask you what that is?

A. That was written by myself, and is the testimony of baptism. I have written the whole document.

Mr. Tamba: I offer the photostatic copy of the baptismal certificate as defendant's Exhibit "2," in evidence. It bears the date April 18, 1945.

Mr. Storey: No objection.

Q. Father, I show you another document (counsel hands paper to witness), and ask you what that is?

A. Yes. I think—it is just a copy of what I have written.

Q. Is that a certificate of marriage?

A. It is the baptismal certificate. It should be a copy. It is [4] the signature of Father Heuvers,

(Deposition of Heinrich Dumoulin.)

who was the parish priest of the church. I took his place during his illness and now he is recovered.

Q. Is that your signature (Counsel points to paper)?

A. No, it is just a copy. I think it is an exact copy of what I have written. As far as I can see it is a copy of the photograph and that is what I have written.

Q. On the other side of this page (counsel points to the reverse side of the same document), may I ask what is on there?

A. Yes. That is a copy, too.

Q. I am referring to defendant's exhibit "1," for the purpose of the record, is this language on the back of this document I am showing you the same as that?

A. There are two books in the parish. . One book of baptismal records and one of matrimony records and that is a photograph taken of the book of baptismal records, Exhibit "2." That is, the photograph taken from the book of matrimony, Exhibit "1," which is the principal thing, and that I wrote myself on the inside, and on the reverse we make reference where the status of the person has changed, confirmation and first communion and marriage, and that is a copy.

Q. Do you remember who was present at the marriage, that is if you recall?

A. I remember. Father Kraus, and the couple, and there were certainly two witnesses present that

(Deposition of Heinrich Dumoulin.)

signed the document. Let me see (witness consults paper). Yes, Mr. Pinto and Rita D'Aquino.

Q. Their names are contained in Exhibit "1" of the record?

A. Yes. Of course these two documents are of the highest value, signed by these people and in this case by myself and Father Kraus and the couple, and these books are regarded of the highest value, and we had to save these books in case of incendiary—— [5]

Q. Do you remember I came up to the university and looked at the books with you and Father Van?

A. Yes.

Q. What is Father Van's full name?

A. Van Overmeeren. I saw the Father first bring the books to you.

Q. How long did this course of instruction continue, if you remember?

A. I cannot exactly remember. When she came for the first time I don't remember the exact date of that but it must have been—I was replacing Father Heuvers and you can make sure about the sickness of Father Heuvers. I think he fell ill during the month of January, about the second half of January, and it must have been some time after that.

Q. Do you remember the day of the marriage, that there was a big air raid in Tokyo?

A. Yes, there was an air raid in Tokyo, and we had to take refuge and I remember that after coming from the refuge we went to the parlor and

(Deposition of Heinrich Dumoulin.)

were quite pleased that the ceremony and all things had taken place, that it was possible.

Q. After the marriage do you remember seeing Mrs. D'Aquino again?

A. I don't exactly. Maybe, but I have a faint remembrance, but I don't recall exactly.

Q. You have no recollection of her coming to church?

A. I think she came, but I could not say with certainty.

Q. Did she ever discuss the war with you, Father Dumoulin? A. Never.

Q. Did she ever discuss with you—well, did she appear to be sincere in becoming a member of your faith?

A. I had the impression that she wanted to be a Catholic and, as I told you the other day when you came to see us, I don't remember exactly her conversation, but first I must explain that I must have explained to Mr. D'Aquino and to Miss Toguri, that they could [6] be married in the Catholic Church without her being a Catholic; that it would be easy to have permission. That is a thing I always explain in such cases. It was my responsibility to explain that so that I must have explained that to the couple, and I remember that Father Kraus was quite satisfied about the way things were going on, but I don't remember any conversation with Father Kraus in exact terms, but matrimony took place and everything was all right.

(Deposition of Heinrich Dumoulin.)

Cross-Examination

By Mr. Storey:

Q. Father Dumoulin, did Miss Toguri tell you that she was an American citizen at the time that she married Mr. D'Aquino?

A. I cannot remember that. I cannot remember that.

/s/ H. DUMOULIN. [7]

Japan,

City of Tokyo,

American Consular Service—ss.

I do solemnly swear that I will truly and impartially take down in notes and faithfully transcribe the testimony of Heinrich Dumoulin, a witness now to be examined. So help me God.

/s/ MILDRED MATZ.

Subscribed and sworn to before me this twenty-ninth day of April, A.D. 1949.

/s/ THOMAS W. AINSWORTH,

Vice Consul of the

United States of America.

[American Consular Service Seal.]

Service No. 668a; Tariff No. 38; No fee prescribed.

Japan,
City of Tokyo,
American Consular Service—ss.

CERTIFICATE

I, Thomas W. Ainsworth, Vice Consul of the United States of America in and for Tokyo, Japan, duly commissioned and qualified, acting under the authority of a certain stipulation for taking oral designations abroad, and upon order of the United States District Court, made and entered March 22, 1949, in the Matter of United States of America, Plaintiff, vs. Iva Ikuko Toguri D'Aquino, Defendant, pending in the Southern Division of the United States District Court, for the Northern District of California, and at issue between United States of America vs. Iva Ikuko Toguri D'Aquino, do hereby certify that in pursuance of the aforesaid stipulation and court order and at the request of Theodore Tamba, counsel for the defendant Iva Ikuko Toguri D'Aquino, I examined Heinrich Dumoulin, at my office in Room 335, Mitsui Main Bank Building, Tokyo, Japan, on the twenty-eighth day of April, A.D. 1949, and that the said witness being to me personally known and known to me to be the same person named and described in the interrogatories, administering of the oath to the witness having been waived by oral stipulation between Theodore Tamba, counsel for the defendant, and Noel Storey, counsel for the plaintiff, his evidence was taken down and transcribed under my direction by Mil-

dred Matz, a stenographer, who was by me first duly sworn truly and impartially to take down in notes and faithfully transcribe the testimony of the said witness Heinrich Dumoulin, and after having been read over and corrected by him, was subscribed by him in my presence; and I further certify that I am not counsel or kin to any of the parties to this cause or in any manner interested in the result thereof.

In witness whereof, I have hereunto set my hand and seal of office at Tokyo, Japan, this 16th day of May, A.D. 1949.

/s/ THOMAS W. AINSWORTH,
Vice Consul of the
United States of America.

[American Consular Service Seal.]

Service No. 897; Tariff No. 38; No fee prescribed.

In the Southern Division of the United States
District Court for the Northern District of
California

No. 31712 R

UNITED STATES OF AMERICA,

Plaintiff,

vs.

IVA IKUKO TOGURI D'AQUINO,

Defendant.

DEPOSITION OF KATSUO OKADA

Deposition of Katsuo Okada, taken before me, Thomas W. Ainsworth, Vice Consul of the United States of America, in Mitsui Main Bank Building, Room 335, in Tokyo, Japan, under the authority of a certain stipulation for taking oral designations abroad, and upon order of the United States District Court, made and entered March 22, 1949, in the Matter of the United States of America vs. Iva Ikuko Toguri D'Aquino, pending in the Southern Division of the United States District Court for the Northern District of California, and at issue between the United States of America vs. Iva Ikuko Toguri D'Aquino.

The plaintiff appearing by Frank J. Hennessy, United States District Attorney; Thomas DeWolfe, Special Assistant to the Attorney General, and Noel Storey, Special Assistant to the Attorney General, and the defendant, appearing by Wayne N. Collins and Theodore Tamba.

It appearing that the witness Katsuo Okada could not intelligently testify in the English language and did well understand the Japanese language, one Makoto Matsukata, who also well understand said language, was employed as interpreter, and was sworn in as follows:

“You do solemnly swear that you know the English and Japanese languages and that you will truly and impartially interpret the oath to be administered and interrogatories to be asked of Katsuo Okada, a witness now to be examined, out of the English language into the Japanese language, and that you will truly and impartially interpret the answers of the said Katsuo Okada thereto out of the Japanese language into the English language, so help you God.”

The said interrogations and answers to the witness thereto were taken stenographically by Mildred Matz and were then transcribed by her under my direction, and the said transcription being thereafter read over correctly to the said witness by me and then signed by said witness in my presence.

It is Stipulated that all objections of each of the parties hereto, including the objections to the form of the questions propounded to the witness and to the relevancy, materiality and competency thereof, and the defendant's objections to the use of the deposition, or any part of the deposition, by plaintiff, on the plaintiff's case in chief, shall be reserved to the time of trial in this cause.

KATSUO OKADA

of Tokyo, Japan, of lawful age, being by me duly sworn, deposes and says:

Direct Examination

By Mr. Tamba:

Q. Mr. Okada, do you live in Japan?

A. Yes.

Q. Are you a citizen and national of Japan?

A. Yes.

Q. Were you a member of an organization known as the Kempei Tai? [2*]

A. Yes.

Q. How many years were you in the Kempei Tai?

A. Five years.

Q. Did you have a rank in the Kempei Tai?

A. Yes, I did.

Q. What was that rank?

A. Master Sergeant.

Q. Did the Tokyo Kempei Tai always wear uniforms?

A. As for myself, most of the time I wore ordinary civilian clothes, but on special occasions I wore my uniform.

Q. Was that true of most members of your organization?

A. It depended on the section and it was divided into those who wore uniforms and those that certain days in the month wore uniforms and other times wore ordinary civilian clothes.

Q. You were a friend of Iva D'Aquino?

* Page numbering appearing at bottom of page of original Reporter's Transcript.

(Deposition of Katsuo Okada.)

A. Yes.

Q. You were a friend of Philip D'Aquino?

A. Yes.

Q. And you are also a friend of Mrs. Kido and Mr. Kido, the people with whom the D'Aquinos lived, is that correct? A. No mistake.

Q. Now, you have talked with Mr. D'Aquino about this case many times, have you not?

A. Is it concerning Iva?

Q. Yes, concerning Iva.

A. While Iva was in Sugamo Prison I talked with him many times. After Iva was taken to the United States I met him six or seven times.

Q. And you have met me three times?

A. Three times, including today.

Q. When did you first meet Iva D'Aquino?

A. Approximately October, 1944. [3]

Q. Are you sure you did not meet her in 1943?

A. I am not sure whether it was 1943 or 1944, but it was at the time Tojo quit the Prime Ministership.

Q. Into how many organizations was the Kempei Tai divided?

A. Three sections that worked outside.

Q. What were those sections?

Mr. DeWolfe: Object to that as incompetent, irrelevant, immaterial.

The Court: Objection sustained.

Mr. Collins: The purpose of that, if it please the Court, was to show the sections and the divi-

(Deposition of Katsuo Okada.)

sions of the sections and their respective functions, of the sections, insofar as their activities were concerned which directly related to checks upon the defendant.

The Court: The Court has ruled.

(A. Thought Control, it was divided into two sections; communistic activities, and activities contrary to communistic activities; besides that there was a section called "foreign nationals section," such as Niseis and foreigners.)

Q. What section did you belong to, Mr. Okada?

Mr. DeWolfe: Object to that as incompetent, irrelevant and immaterial.

The Court: Objection sustained.

(A. I was in the Thought Control Section, in the part that was investigating rightists organizations, one that was not investigating communism.)

Q. Do you know whether or not members of the Kempei Tai organizations were watching Mrs. D'Aquino? A. Yes, I know.

Q. Do you know whether or not members of the Metropolitan Police were watching Iva D'Aquino?

A. Yes, I do.

Q. Do you know the names of the Kempei Tai who were watching Iva D'Aquino?

A. There were two. I don't know the name of one, but I do know the last name of one, which is Tanaka.

Q. What became of the records of the Kempei Tai?

(Deposition of Katsuo Okada.)

Mr. DeWolfe: Object to that as incompetent, irrelevant and immaterial.

The Court: Objection sustained.

(A. The papers connected with our work were burned on approximately the tenth of August, 1945, when it was obvious that we had lost the war.)

Q. Did you ever discuss the war with Iva D'Aquino?

A. Do you mean during the war?

Q. Yes, during the war?

A. Yes, I have. [4]

Q. How many times?

A. So many times that I cannot possibly count.

Q. What did she say to you and what did you say to her about the war?

A. Fundamentally, the point that was brought out was that Iva did not know when the war would be over but, finally, when the war was over Japan would lose.

Q. What did you say to her when she told you that information?

A. As to who was going to win or lose the war was up to the way the individual thought. "You, as a person who has had long residence in the United States, you know the strength of the United States well. So, it is probably correct that you say America is going to win the war. I don't want to think that Japan will lose the war. For you to talk about the fact that Japan is going to lose the war is not good because you will be violating Jap-

(Deposition of Katsuo Okada.)

anese law and, therefore, I caution you that you better not talk about this to outsiders. If you talk about such things to people other than myself you will be investigated by the Kempei gendarme and the Metropolitan Police. I am also a Kempei, but I am also your friend. I don't want to accuse you of a crime, but I am going to caution you of this as a friend."

Q. Did you have authority to arrest Iva D'Aquino, if you wished to do so?

A. Yes, I did.

Q. In your acquaintanceship with Iva D'Aquino did you consider her pro-American or pro-Japanese?

Mr. DeWolfe: Object to that as calling for a conclusion.

The Court: Objection sustained.

(A. I thought she was pro-American.)

Q. Was Iva D'Aquino one of the Nisei watched by the Kempei Tai, if you know?

A. Yes, she was.

Q. Did Iva D'Aquino ever participate in air raid drills? [5]

A. I have never seen her.

Q. Did she ever tell you that air raid drills were silly because Japan was going to lose the war, or was losing the war?

A. She constantly said Japan would lose the war, but she really had not much thought for air raid drills, and she said air raid drills were things for children to do.

(Deposition of Katsuo Okada.)

Q. Was she ever called a spy in the neighborhood where she lived?

Mr. DeWolfe: Object to that as hearsay, not proper direct examination.

The Court: Objection sustained.

(A. The children used to call her "spy" after she had passed. I have heard this, but that definition of spy is in the broad sense, not in the narrow sense, meaning that anybody that did not help Japan's effort was considered a spy. The first big air raid was the 10th of March, 1945. At that time I was staying at Iva's home. The people in the neighborhood were all outside preparing water. Iva and Philip, looking in the distance where it was burning, said in a loud voice: It's burning, it's burning," they said incendiary bombs drop and they said they were like fireworks, and were making a lot of noise. As far as incendiaries were concerned, they would drop one from a plane and then they would all scatter just like fireworks. At that time I heard people in the neighborhood yelling or saying: "Spy," to them.)

Q. Do you know what nationality Philip D'Aquino has? A. I do.

Q. What is his nationality?

A. I heard that it was Portuguese.

Q. Do you know the nationality of Philip D'Aquino's father? A. I have heard it.

Q. What was his nationality?

A. The same. Portuguese, so I have heard.

(Deposition of Katsuo Okada.)

Q. What became of Philip D'Aquino's father during the war, if you know?

A. I heard——

Mr. DeWolfe: Object to that as incompetent, irrelevant and immaterial.

The Court: Sustained.

(A. I heard that he was in Karuizawa during the war with other foreigners.) [6]

Q. Was he forcefully taken from Tokyo or Yokohama, do you know?

Mr. DeWolfe: Same objection, sir.

The Court: Same ruling.

(A. During the war all those foreign nationals of opposing countries were forcefully evacuated to Karuizawa or Hakone.)

Q. Could a Nisei get into an alien internment camp?

Mr. DeWolfe: Object to that as incompetent, irrelevant and immaterial; calling for a conclusion.

The Court: Objection sustained.

(A. They did not go as their number was large.)

Q. Do you remember an occasion when Mrs. Kido broke up with her relatives on account of Iva and Philip D'Aquino living with her?

Mr. DeWolfe: Just a moment, Mr. Tamba. Object to that as incompetent, irrelevant and immaterial, hearsay, calling for a conclusion.

The Court: Sustained.

Mr. Collins: This goes to the question of whether or not, if Your Honor please, there was any duress

(Deposition of Katsuo Okada.)

in the neighborhood against the defendant which compelled, or which caused the Kidos at least, to think about ousting the defendant from their home.

The Court: Read the question. I don't recall that that was embodied in the question.

(Question read.)

The Court: Objection sustained.

(A. The Kido home, in which Iva and Philip were living was next to Kido's brother's home and due to the fact that the neighbors did not say good things about the D'Aquinos living in the house they separated their relationship, but people next door (the brother's family) had encouraged them to put out Iva and Philip.)

Q. Was Iva living with Mrs. Kido before she married D'Aquino?

A. She was living there before she was married.

Q. Was she living there when you first met her?

A. The first time I met Iva was when she came to visit the Kido's at the time I was there. Shortly after I met Mrs. Kido and she had said, "that girl wants me to let her live here."

Mr. DeWolfe: Object to that as hearsay.

The Court: Objection sustained.

Mr. DeWolfe: The balance of the answer is conversation between a Mrs. Kido and this witness.

Mr. Collins: It goes to the question of the duress, exercised upon the defendant, if Your Honor please, concerning a place to live.

(Deposition of Katsuo Okada.)

The Court: That doesn't take it out of the hearsay rule.

Mr. Collins: It is a question of advice given by a Kempei tai who was an officer of the Japanese government to the landlady where the defendant resided.

The Court: The Court has ruled. Proceed. You have a record.

(A. The first time I met Iva was when she came to visit the Kidos at the time I was there. Shortly after that I met Mrs. Kido and she said: "That girl wants me to let her live there, but do you think it is advisable?" I said: "During the war, to let foreigners live in your house will hamper your relations with the neighbors, but if you caution that foreigner well, so she does not commit any mistakes, and you are cautious yourself, I think it will be all right to let them live there.")

Q. Do you know whether or not Iva ever bought war bonds? A. She never bought any.

Q. Do you know whether or not the people of Japan could change jobs during the war?

A. Do you mean Japanese people?

Q. Yes.

A. Japanese people could change their jobs.

Q. How about foreigners?

A. It was free for foreigners to change their jobs, but depending on their jobs. [7]

Q. Was it easy for people who were foreigners to get jobs in Japan during the war?

(Deposition of Katsuo Okada.)

A. Even if they were good in Japanese it was very hard.

Q. But Iva D'Aquino spoke very good Japanese?

A. She could speak well enough not to hamper her daily living.

Q. Was it good Japanese?

A. If an ordinary person heard it they could determine right away that she was a foreigner.

Q. Were you able to tell foreigners when you heard them speak Japanese?

A. When I first met her I could decide.

Q. Did you ever see a post card from the radio station, Tokyo, ordering Iva D'Aquino to return to her work? A. Yes.

Mr. DeWolfe: Just a moment, Mr. Tamba. I ask that answer go out and object to the question on the ground that it calls for something not the best evidence.

The Court: Read the question, Mr. Reporter.

(Question read.)

Mr. Collins: This does not ask for the content.

The Court: The objection will be sustained. Let the answer go out.

Q. Were ordinary people permitted to talk with prisoners of war?

A. Not ordinary townspeople.

Q. Do you know whether or not Iva D'Aquino bought food through the black market for prisoners of war?

A. Yes, I know, but Iva did not buy the food

(Deposition of Katsuo Okada.)

directly herself. She had Mrs. Kido buy it for her.

Q. Did Iva D'Aquino ever tell you what kind of work she was doing at the radio station?

A. I asked her once.

Q. What did she tell you?

A. She said that "four or five days out of the week I broadcast a script that was written by prisoners of war or other people in Radio Tokyo. The people that write that script are American prisoners of war, and Australian soldiers, and Filipino soldiers. Those people write it, and I broadcast in the evenings ten to fifteen minutes."

Q. Did Iva D'Aquino ever tell you that she discussed the war with [8] prisoners of war?

A. Yes.

Q. What did she tell you about it?

A. "The American, Australian and Filipino soldiers cannot hear news about the war." The news that she heard from other people she would write on a little memo and when she went to Radio Tokyo she would put it under something and give it to them. The prisoners were very appreciative of this.

Q. Do you know whether or not Iva D'Aquino had access to short wave news broadcasts from the United States?

A. I think she could listen to it at the broadcasting station. At that time you could not listen to it in town.

Q. Did she tell you that she had heard short wave broadcasts?

A. Yes, she did.

(Deposition of Katsuo Okada.)

Q. Did she tell you that she got information from her husband who was working for Domei?

A. Philip worked for Domei and there were people that were listening to the short wave broadcasts in Radio Tokyo. Those people contributed to her information.

Cross-Examination

By Mr. Storey:

Q. Mr. Okada, do you recall that you had a discussion with me immediately prior to this deposition? A. Yes, I do.

Q. Do you recall that during that discussion you told me that you first met Mrs. D'Aquino in October, 1944?

A. Yes, I do remember, but as to the date I don't remember whether it was the eighteenth year of Showa, which is 1943, or the nineteenth year of Showa, which is 1944. I know it is the year that Tojo quit.

Q. Mr. Okada, how long have you known Mrs. Kido?

A. I am not sure of the year but I think it is 1942 or 1943.

Q. When did Iva move to the home of Mrs. Kido? [9]

A. I think it is the time when Tojo quit.

Q. How far was your home from the home of Mrs. Kido?

A. In the Japanese way of counting, two and one-half RI to three RI.

(Deposition of Katsuo Okada.)

Q. How often were you in the home of Mrs. Kido?

A. At the most once a week, and when I was busy, about once every two weeks.

Q. Where was Mr. Kido at this time?

A. He was at war in Manchuria.

Q. When you first met Iva, was she married?

A. Do you mean with Philip?

Q. Yes.

A. No, she had not married Philip.

Q. Was Philip living there with Iva from the time when you first met her?

A. When I first met her she was just coming there alone, and then—I am quite sure, but shortly after that Philip came there.

Q. Approximately what date did Philip come there?

A. The first time I was introduced to Philip was about one month after I was first introduced to Iva.

Q. Was he living there at the time?

A. He had a house in Atsugi and his baggage was in Atsugi, and he would commute to the Tokyo Domei from Atsugi, and there were times when he would stay at Mrs. Kido, and times when he would go directly home to Atsugi. Iva was in Atsugi before she came to Kido's place.

Q. Mr. Okada, do you consider yourself a very close friend to the D'Aquino's?

A. As the time that I was associated with them was such as it was I think we were close friends, but I do not know how they felt.

(Deposition of Katsuo Okada.)

Q. Mr. Okada, you have testified that you knew that the Kempei Tai was watching Miss Toguri, did the Kempei watch all foreign [10] nationals who were registered in Japan?

A. The Kempei kept surveillance over all neutrals and enemy country nationals.

Q. Did the Kempei also keep certain Japanese nationals under surveillance? A. Yes.

Q. Did Iva know that you were a member of the Kempei when you first met her and during your later associations with her?

A. Yes, she did.

Q. And during this time Iva was still very friendly with you? A. Yes.

Q. Mr. Okada, you have testified that you were told——

Mr. DeWolfe: I am not going to offer the next question because it is related to hearsay matter that went out on direct examination.

The Court: Very well.

Mr. DeWolfe: The next appears at line 17.

(Q. Mr. Okada, you have testified that you were told Philip D'Aquino's father was evacuated to a recreational town, Karuizawa?)

A. After the war, when D'Aquino's father came back to Atsuki I talked with him.)

Q. What other foreign nationals were evacuated to this area?

A. I don't know in detail, but I know that the foreigners were transferred—evacuated to Karui-

(Deposition of Katsuo Okada.)

zawa and Hakone, with the exception of those who were necessary to Japan.

Q. Were these foreign nationals evacuated to this area because they were considered dangerous to the internal security of Japan?

A. That, and one more thing, that they did not want any injuries to be brought on foreign nationals by the Japanese.

Q. Then the Niseis were not considered dangerous to Japan—the ones who were working in Tokyo?

A. That was not my responsibility to determine that and, therefore, I do not know, but as the numbers of Niseis, Manchurians and Chinese were great I do not think that they had the facilities to take them away.

Q. Could any Japanese national quit any job at any time he desired during the war?

A. As far as principle was concerned, they were free. Any healthy [11] people which were not working, according to a law, Choyorei, were forcefully made to work in factories necessary to the war effort. Those people were the same as soldiers and unless they were taken sick, they were not allowed to quit.

Q. If a Japanese national working in one of these war factories were to be absent from his plant would he receive a post card instructing him to come back to work when he was physically able to work?

A. There were times when they were called out

(Deposition of Katsuo Okada.)

by post card or the factory personnel would come and take him off to the factory, and it was also a crime for those who said they were sick if they were not sick, or ran away.

Q. You have testified that Iva bought food which she gave to the prisoners of war. What were these prisoners of war doing in Japan at that time?

A. In the case of Iva, most of them were working in the broadcasting station.

Q. They were working for the Japanese Government at the broadcasting station?

A. Yes, they were forcefully made to work there.

Q. What were they doing, were they broadcasting?

A. I have never seen them but according to Iva's story they would write script or broadcast.

Q. Mr. Okada, were you ever physically present when Mrs. D'Aquino was questioned by the Kempei? I mean when the Kempei was talking to Miss Toguri personally?

A. I have never seen her talking directly to the Kempei Tai but I have seen her talk to the police.

Redirect Examination

By Mr. Tamba:

Q. Mr. Okada, the Kido family comes from the town where you were born and reared?

A. Yes, where Mr. Kido came from. [12]

Q. And you have been a friend of Mr. Kido's for many years, I assume.

A. Yes.

(Deposition of Katsuo Okada.)

Q. Mr. Okada will you tell us how the Kempei Tai investigated or worked on a case?

Mr. DeWolfe: Objected to incompetent, irrelevant and immaterial.

Mr. Collins: The matter was developed on cross-examination.

Mr. DeWolfe: I don't think it was gone into on cross-examination.

The Court: What have you in mind?

Mr. Collins: Well, as I say, it has a relation with the balance of it. It is a question of how the Kempei tai lists people and the type of surveillance to which they subject them, depending upon their classification as to whether they were foreign nationals or Japanese nationals. It is a matter within the personal knowledge of this Kempei tai master sergeant.

The Court: In the interest of time I will allow it.

A. Do you mean in regards to foreign nationals, or somebody else?

Q. In regards to foreign nationals, or any case that was being investigated.

Mr. DeWolfe: Just a moment. Object to it as incompetent, irrelevant and immaterial.

The Court: Objection will have to be sustained.

(A. Cases are started by people. That is why you investigate the person first. Do you just mean the Kempei Tai or the police too?)

Q. Well, the Kempei Tai.

(Deposition of Katsuo Okada.)

Mr. DeWolfe: Same objection and then there is an answer about a page long about investigational procedure.

The Court: These matters have no relation to this case.

Mr. Collins: If your Honor please, you see the question was split, but it comes to a question of the duties of Kempei tai in so far as foreign national are concerned and the interference to which they subjected foreign nationals, depending upon the type what type they put them into; that is, either they divided them into rightists or leftists.

The Court: Well, I don't know where I got this thought, but it seems to me that running through the record it appears that their duty was that of a policeman in comparison with our own. Somebody suggested that. Am I in error in that question?

Mr. Collins: It is little more than that. From the deposition of this very officer of the Kempei tai. Because they were the thought control police.

The Court: Read the question, Mr. Reporter.

(Question read.)

Mr. De Wolfe: And then there is a long answer that has no bearing on the facts or the defendant in this case. It is very general.

Mr. Collins: She falls in the classification as being subjected to the interference of the Kempei tai as a foreign national and this answer relates directly to that, stating too, that every foreign na-

(Deposition of Katsuo Okada.)

tional and one other type, have always two policemen together with two Kempei tai attached.

The Court: It did not matter whether it was two or four. The objection will be sustained.

(A. In the Kempei Tai there are books listing foreign nationals, communists, rightists, and many other such books, and among many Kempei Tai they decide who is responsible for what. The Kempei Tai has the responsibility for foreign nationals or communists. They will first investigate their residence and then will question the neighbors as to the necessary things. That is carried on during several times, and from among those they would pick out those who they think are suspicious. They will survey those which they consider especially suspicious from what the neighbors say, and if they are a foreigner and acting in a way of a spy they will arrest them. If the communist is also conducting underground activities they will arrest him, and on one foreigner they will always have one Kempei Tai from the headquarters and one from the section. There are also two from the police. In the case that the foreigner or the communist moves the Kempei will send their card to the Kempei detachment in that area and the police will send their card to the area to which the person has moved, and so to every foreigner and communist there are always two policemen and two Kempei attached.) [13]

Japan,
City of Tokyo,
American Consular Service—ss.

I do solemnly swear that I will truly and impartially take down in notes and faithfully transcribe the testimony of Katsuo Okada, a witness now to be examined. So help me, God.

/s/ MILDRED MATZ.

Subscribed and sworn to before me this 26th day of April, A.D. 1949.

/s/ THOMAS W. AINSWORTH,
Vice Consul of the United
States of America.

[American Consular Service Seal.]

Service No. 632a; Tariff No. 38; No Fee prescribed.

Japan,
City of Tokyo,
American Consular Service—ss.

CERTIFICATE

I, Thomas W. Ainsworth, Vice Consul of the United States of America in and for Tokyo, Japan, duly commissioned and qualified, acting under the authority of a certain stipulation for taking oral designations abroad, and upon order of the United States District Court, made and entered March 22, 1949, in the matter of United States of America, Plaintiff, vs. Iva Ikuko Toguri D'Aquino, Defendant, pending in the Southern Division of the United

States District Court, for the Northern District of California, and at issue between United States of America vs. Iva Ikuko Toguri D'Aquino, do hereby certify that in pursuance of the aforesaid stipulation and court order and at the request of Theodore Tamba, counsel for the defendant Iva Ikuko Toguri D'Aquino I examined Katsuo Okada, at my office in Room 335, Mitsui Main Bank Bulding, Tokyo, Japan, on the twenty-sixth day fo April, A.D. 1949, using as interpreter Makoto Masukata, who was by me first duly sworn truly and impartially to interpret the oath to be administered and interrogatories to be asked of the witness out of the English into the Japanese language, and truly and impartially to interpret the answers of the witness thereto out of the Japanese language into the English language; and that the said witness being to me personally known and known to me to be the same person named and described in the interrogatories, being by me first sworn to testify the truth, the whole truth, and nothing but the truth in answer to the several interrogatories and cross-interrogatories in the cause in which the aforesaid stipulation, court order, and request for deposition issued, his evidence was taken down and transcribed under my direction by Mildred Matz, a stenographer who was by me first duly sworn truly and impartially to take down in notes and faithfully transcribe the testimony of the said witness Katsuo Okada, and after having been read over and corrected by him, was subscribed by him in my presence; and I fur-

ther certify that I am not counsel or kin to any of the parties to this cause or in any manner interested in the result thereof.

In witness whereof, I have hereunto set my hand and seal of office at Tokyo, Japan, this 12th day of May, A.D. 1949.

/s/ THOMAS W. AINSWORTH,
Vice Consul of the United
States of America.

[American Consular Service Seal.]

Service No. 861; Tariff No. 38; No fee prescribed.

[May 17, 1949.]

In the Southern Division of the United States
District Court for the Northern District of
California

No. 31712 R

UNITED STATES OF AMERICA,
Plaintiff,

vs.

IVA IKUKO TOGURI D'AQUINO,
Defendant.

DEPOSITION OF
KAZUYA MATSUMIYA

Deposition of Kazuya Matsumiya, taken before me, Thomas W. Ainsworth, Vice Consul of the United States of America, in Mitsui Main Bank Building, Room 335, in Tokyo, Japan, under the authority of a certain stipulation for taking oral designations abroad, and upon order of the United States District Court, made and entered March 22, 1949, in the Matter of the United States of America vs. Iva Ikuko Toguri D'Aquino, pending in the Southern Division of the United States District Court, for the Northern District of California, and at issue between the United States of America vs. Iva Ikuko Toguri D'Aquino.

The plaintiff appearing by Frank J. Hennessy, United States District Attorney; Thomas DeWolfe, Special Assistant to the Attorney General, and Noel Storey, Special Assistant to the Attorney General,

and the defendant, appearing by Wayne N. Collins and Theodore Tamba.

The said interrogations and answers to the witness thereto were taken stenographically by Mildred Matz and were then transcribed by her under my direction, and the said transcription being thereafter read over correctly to the said witness by me and then signed by said witness in my presence.

It Is Stipulated that all objections of each of the parties hereto, including the objections to the form of the questions propounded to the witness and to the relevancy, materiality and competency thereof, and the defendant's objections to the use of the deposition, or any part of the deposition, by plaintiff, on the plaintiff's case in chief, shall be reserved to the time of trial in this cause.

KAZUYA MATSUMIYA

of Tokyo, Japan, of lawful age, and employed by CI&E Section, SCAP, being by me duly sworn, deposes and says:

Direct Examination

By Mr. Tamba:

Q. What is your full name, sir?

A. Kazuya Matsumiya.

Q. And what is your present business and occupation?

A. I am working as an adviser in the CI&E, SCAP.

Q. And you were born in Japan?

A. Yes.

(Deposition of Kazuya Matsumiya.)

Q. You have had some education in the United States, have you, sir? A. Yes.

Q. And what schools did you attend in the United States?

A. I attended Earlham University, Richmond, Indiana.

Q. Do you hold a degree from that school?

A. Yes.

Q. Was that a Quaker school? A. Yes.

Q. Did you attend any other schools in the United States?

A. After graduating from Earlham I attended for one year at Columbia University and did graduate work there. [2*]

Q. Did you attend other schools there besides those two you mentioned?

A. After that I studied at Hartford Seminary, from where I got a MA Degree.

Q. Have you taught in any American university?

A. Yes.

Q. In what university have you taught?

A. University of California, Berkeley.

Q. How long did you teach there?

A. One year.

Q. Do you know a person by the name of Iva Toguri, also known as D'Aquino? A. Yes.

Q. And when and where did you first meet this person, sir? A. I met her in Tokyo.

Q. Under what circumstances?

* Page numbering appearing at bottom of page of original Reporter's Transcript.

(Deposition of Kazuya Matsumiya.)

A. She came to my father's school which is called the School of Japanese Language and Culture.

Q. When was that? Do you remember the year and date?

A. I don't remember the date and year exactly but before the war, probably '40.

Q. Did she attend your school? Was she enrolled in your school? A. Yes, she did.

Q. And for how long a period of time was she in your school?

A. About a year and a half—she was a little less than a year and a half.

Q. She registered there in September, 1941?

A. Before the war?

Q. Yes. A. I believe it was that.

Q. In any event she registered at your school before the war? A. Yes. [3]

Q. Was your school destroyed in the air raids?

A. Yes.

Q. And the records of the school were destroyed? A. Yes.

Q. And your school was a school which catered to adult classes, to people who were either missionaries or in the diplomatic service, is that correct?

A. Yes.

Q. Do you know whether or not Iva Toguri had a good knowledge of the Japanese language?

A. In my impression she was a rather poor student in language.

(Deposition of Kazuya Matsumiya.)

Q. In other words, she did not know Japanese very well? A. Very little.

Q. And she did not have much aptitude for acquiring a knowledge of the language?

A. The main reason for that was she had not attended a Japanese school in America. Ordinarily Niseis who came to Japan had previously had training in Japanese schools in California—or in America, but she did not have much training in Japanese in America.

Q. Now, do you know what her financial condition was at the time she attended your school?

A. Well, she was in a rather financially difficult situation.

Q. Did you or your family do anything to assist her financially? A. Yes, I did.

Q. What did you do, sir?

A. Well, firstly at that time I was writing a book on Japanese grammar, in English, so that I used her for typing the manuscript, and secondly, my wife also gave her some work teaching piano lessons to my children and our friends' children.

Q. And that was done in order to assist her to pay her tuition, is that correct? [4] A. Yes.

Q. Can you tell us what her attitude was towards the Japanese people generally, if you know.

Mr. DeWolfe: Object to that as calling for a conclusion.

(Deposition of Kazuya Matsumiya.)

(A. Generally speaking she was rather critical about the Japanese.)

Q. Do you know what the Kempei Tai organization was, Mr. Matsumiya? A. Yes.

Q. What was that, sir?

A. Well—organization of the Kempei Tai?

Q. Yes, in other words, they were the secret police, were they not?

A. Yes, they had that section of Kempei Tai.

Q. Did they ever check your school with reference to Iva Toguri?

A. Not specifically Miss Toguri, but my students in general.

Q. How often did they check your school?

A. They came about twice a week.

Q. Did any other Japanese organization check your school with reference to Iva Toguri or any of your other students? A. The police.

Q. That would be the Metropolitan police?

A. Yes, Atago Police Station.

Q. How often did they check your school with reference to the students or Miss Toguri?

A. About once a week, or so.

Q. Did any of these calls by the Kempei Tai or the local police disturb your school program?

A. Well, they did not disturb the actual work but certainly they disturbed me. I was executive secretary.

Q. Did Miss Toguri have occasion to relate to you her experiences in the United States?

(Deposition of Kazuya Matsumiya.)

A. Yes, she did.

Q. With reference to what?

A. Well, she was telling me about her family, and particularly [5] that she was working through her college by assisting her father. For instance, driving the trucks from the farm to the city. I gathered she was very independent in a sense.

Q. From what you know of Miss Toguri and her association with you while she was attending your school, can you tell us whether she was pro-American or pro-Japanese?

Mr. DeWolfe: Object to that as calling for a conclusion, incompetent.

The Court: Objection sustained.

(A. In my judgment she was rather pro-American.

Q. Incidentally, do you specialize in any particular type of work?

A. Well, I am in measurement work.

Q. Have you ever done any work in social psychology?

A. Yes.

Q. You have had experience in that field of endeavor?

A. Yes.

Q. Were you familiar with the conditions that existed in Japan during the war with reference to the Nisei people here?

Mr. DeWolfe: Objected to as calling for a conclusion, too general.

The Court: Objection sustained.

(A. During the war all Niseis were in a very

(Deposition of Kazuya Matsumiya.)

difficult position. Generally speaking you can divide them up in two groups. One is rather pro-Japanese and the other is pro-American, and, of course, the pro-American group was in a more difficult position than the other.)

Q. Do you have any knowledge of Miss Toguri going to the American consulate in Yokohama in an attempt to return to the United States?

A. Yes.

Q. What information do you have on the subject?

A. She told me she was trying to go back to America but she could not succeed.

Q. Did she give you any reason for her inability to successfully return to America? A. No.

Q. Incidentally, you left Tokyo at some later date because you were suspected of being pro-American yourself, is that right?

Mr. DeWolfe: I object to that as incompetent, irrelevant and immaterial.

The Court: Objection sustained.

Mr. Collins: And then cross-examination. [6]

(A. Yes.)

Cross-Examination

By Mr. Storey:

Q. Mr. Matsumiya, when is the last time you saw Miss Toguri?

A. I have not seen her since she left the school.

Q. And give us your best recollection when Miss Toguri entered your school.

(Deposition of Kazuya Matsumiya.)

A. It was before the war.

Q. Was it 1936, 1937?

A. I think it was about '40, I think.

Q. What is your best recollection?

A. 1940, about that time, I think.

Q. How long did she remain in your school?

A. About a year and a half.

Q. After she left your school you never saw her any more?

A. No.

Q. You never talked to her any more?

A. No.

Q. Would you be able to recognize Miss Toguri? If I showed you a group photograph would you be able to recognize Miss Toguri among the other Japanese persons?

A. What do you mean——

Q. If I showed you several pictures of Japanese would you be able to recognize her——

A. Yes, I can recognize her.

Q. Did Miss Toguri ever indicate to you in a conversation whom she wanted to win the war?

A. I don't remember exactly.

Q. When did you leave Tokyo, Mr. Matsumiya?

A. Well, it was March '44. I evacuated my family to Karuizawa.

Q. During the time you knew Miss Toguri, did you ever loan her any personal property to help her out?

A. Please, again. [7]

(Question repeated by stenographer.)

A. Yes.

(Deposition of Kazuya Matsumiya.)

Q. What did you lend her?

A. When she moved to a smaller room near the school she borrowed a zabuton—a cushion.

Q. Did Miss Toguri ever return that cushion?

A. No.

Redirect Examination

By Mr. Tamba:

Q. Did Miss Toguri attend your school during the war?

A. Yes, part of the time, I think. [8]

Japan,

City of Tokyo,

American Consular Service—ss.

I do solemnly swear that I will truly and impartially take down in notes and faithfully transcribe the testimony of Kazuya Matsumiya, a witness now to be examined. So help me, God.

/s/ MILDRED MATZ.

Subscribed and sworn to before me this twenty-fifth day of April, A.D. 1949.

/s/ THOMAS W. AINSWORTH,

Vice Consul of the United
States of America.

[American Consular Service Seal]

Service No. 617a; Tariff No. 38; No fee prescribed.

Japan,
City of Tokyo,
American Consular Service—ss.

May 7, 1949.

CERTIFICATE

I, Thomas W. Ainsworth, Vice Consul of the United States of America in and for Tokyo, Japan, duly commissioned and qualified, acting under the authority of a certain stipulation for taking oral designations abroad, and upon order of the United States District Court, made and entered March 22, 1949, in the Matter of United States of America, Plaintiff, vs. Iva Ikuko Toguri D'Aquino, Defendant, pending in the Southern Division of the United States District Court, for the Northern District of California, and at issue between United States of America vs. Iva Ikuko Toguri D'Aquino, do hereby certify that in pursuance of the aforesaid stipulation and court order and at the request of Theodore Tamba, counsel for the defendant Iva Ikuko Toguri D'Aquino I examined Kazuya Matsumiya, at my office in Room 335, Mitsui Main Bank Building, Tokyo, Japan, on the twenty-fifth day of April, A.D. 1949, and that the said witness being to me personally known and known to me to be the same person named and described in the interrogatories, being by me first sworn to testify the truth, the whole truth, and nothing but the truth in answer to the several interrogatories and cross-interrogatories in the cause in which the aforesaid stipula-

tion, court order, and request for deposition issued, his evidence was taken down and transcribed under my direction by Mildred Matz, a stenographer who was by me first duly sworn truly and impartially to take down in notes and faithfully transcribe the testimony of the said witness Kazuya Matsumiya, and after having been read over and corrected by him, was subscribed by him in my presence; and I further certify that I am not counsel or kin to any of the parties to this cause or in any manner interested in the result thereof.

In witness whereof, I have hereunto set my hand and seal of office at Tokyo, Japan, this seventh day of May, A.D. 1949.

/s/ THOMAS W. AINSWORTH,
Vice Consul of the United
States of America.

[American Consular Service Seal]

Service No. 828; Tariff No. 38; No fee prescribed.

[Endorsed]: Filed May 13, 1949.

In the Southern Division of the United States District Court for the Northern District of California.

No. 31712 R

UNITED STATES OF AMERICA,

Plaintiff.

vs.

IVA IKUKO TOGURI D'AQUINO,

Defendant.

DEPOSITION OF
LARS PEDERSEN TILLITSE

Deposition of Lars Pedersen Tillitse, taken before me, Thomas W. Ainsworth, Vice Consul of the United States of America, in Mitsui Main Bank Building, Room 335, in Tokyo, Japan, under the authority of a certain stipulation for taking oral designations abroad, and upon order of the United States District Court, made and entered March 22, 1949, in the Matter of the United States of America vs. Iva Ikuko Toguri D'Aquino, pending in the Southern Division of the United States District Court, for the Northern District of California, and at issue between the United States of America vs. Iva Ikuko Toguri D'Aquino.

The plaintiff, appearing by Frank J. Hennessy, United States District Attorney; Thomas DeWolfe, Special Assistant to the Attorney General; and Noel Storey, Special Assistant to the Attorney General;

and the defendant, appearing by Wayne N. Collins and Theodore Tamba.

The said interrogatories and answers of the witness thereto were taken stenographically by Irene Cullington and were then transcribed by her under my direction, and the said transcription being thereafter read over correctly to the said witness by me and then signed by said witness in my presence.

It was orally stipulated between Mr. Tamba of the defense, and Mr. Storey of the prosecution, that the administering of the oath to the witness was waived.

It is stipulated that all objections of each of the parties hereto, including the objections to the form of the questions propounded to the witness and to the relevancy, materiality and competency thereof, and the defendant's objections to the use of the deposition, or any part of the deposition, by plaintiff, on the plaintiff's case in chief, shall be reserved to the time of trial in this cause.

The witness stated that he had heretofore furnished a written statement and that his Government had given him permission to testify in accordance with the contents of that written statement.

Direct Examination

By Mr. Tamba:

Q. Mr. Tillitse, you are the Minister from Denmark to Japan, is that right?

A. Yes, I was at that time; now I am the diplomatic representative.

(Deposition of Lars Pedersen Tillitse.)

Q. Mr. Minister, do you know Miss Iva Ikuko Toguri? A. Yes, I know her.

Q. She was employed by the Royal Danish Legation in Tokyo, Mr. Minister?

A. Yes, she was employed as a stenographer-typist from the beginning of January, 1944, until the Legation was closed in May, 1945, following rupture of diplomatic relations between Denmark and Japan.

Q. She was married in the spring of 1945, is that correct? [2*]

A. She was married in the spring of 1945 to a Portuguese subject, Mr. Philip D'Aquino.

Q. Then her name changed?

A. Yes, to Mrs. D'Aquino.

Q. What were her working hours at the Legation, Mr. Minister?

A. She worked daily at the Legation from 9 a.m. to 4 p.m. on week days, except Saturday, when the office closed at 12 Noon.

Q. Mr. Minister, what was her monthly salary?

A. The salary was in yen 150 from January, 1944, to June, 1944, and then yen 160 from July, 1944, to May, 1945. In January she received one month's extra salary, at New Years time, as is the custom in Japan.

Q. Mr. Minister, she worked for your office for approximately 18 months? A. That is correct.

Q. Did you become quite well acquainted with her during that time, Mr. Minister?

* Page numbering appearing at bottom of page of original Reporter's Transcript.

(Deposition of Lars Pedersen Tillitse.)

A. Yes, quite well acquainted.

Q. Was she introduced to your family?

A. Yes; in the summer of 1944 she spent her vacation in our bungalow at Karuizawa.

Q. Mr. Minister, you had certain conversations with Miss Toguri, is that correct?

A. Yes, we talked about many things; also about the war.

Q. What impression did you get of Miss Toguri?

A. I got the impression that she was more like an American than like a Japanese, because she had been educated in America.

Q. Did she have difficulty, if you know, adjusting herself to the Japanese way of life?

A. She often told me about the great difficulty she had in the beginning in adapting herself to the Japanese way of life. [3]

Q. Did she ever tell you that she regretted not being allowed to return to the United States, Mr. Minister?

A. Yes, she did that repeatedly. She wanted to return to the United States in the autumn of 1941, and she was very sorry that she was stranded in Japan during war time.

Q. Did she discuss the war with you during the period of your acquaintanceship?

A. Yes, we often discussed the war, and I remember distinctly that she said that, of course, America would win the war and that it was madness on the part of Japan to try and attack the

(Deposition of Lars Pedersen Tillitse.)

United States, and I always took it for granted that she wanted America to win the war.

Q. Mr. Minister, do you know whether or not she was interrogated by the Japanese police about her work at the Legation?

A. Yes, when she started working for the Danish Legation, she was interrogated by the Japanese police about her work at the Legation, and I have no doubt that she was questioned many times during the period she worked for us.

Q. Did she tell you that, Mr. Minister?

A. I cannot recall it, but it was common knowledge at that time that the police took special interest in all persons who worked for foreigners

Q. You never knew, Mr. Minister, that she worked as a broadcaster at Radio Tokyo?

A. No, I never knew that; she never told me she had such employment.

Q. Did she often tell you news that she had heard?

A. Yes, she would tell me news she had heard from broadcasting people, but I knew she had many friends and I found it quite natural that she was well acquainted with those subjects.

Q. Did you know what her husband's occupation was, Mr. Minister?

A. I thought he was with broadcasting station, but I am not quite [4] sure.

Q. Did you know the nationality of her husband?

A. I think he was half Portuguese and half

(Deposition of Lars Pedersen Tillitse.)

Japanese. By citizenship he was Portuguese and he had a Portuguese passport.

Q. You did not learn of Mrs. D'Aquino's trouble until some time in 1945, is that correct, Mr. Minister?

A. Not until autumn of 1945 when I was back in Denmark. I think it was in "Newsweek" or "Time" that she had been arrested by the occupation authorities in Japan, under suspicion of treason in connection with her radio work.

Q. Was this a surprise to you, Mr. Minister?

A. I was greatly surprised. I was also worried because I knew she was fond of America and because I had never heard of her connection with Radio Tokyo.

Q. That is all.

Cross-Examination

By Mr. Storey:

Q. Mr. Minister, when did you first meet Mrs. D'Aquino?

A. When she came to apply for a position in my Legation.

Q. That was in January, 1944?

A. Either in December, 1943, or January, 1944.

Q. During the period of time that Miss Toguri worked for you, was she absent for any prolonged period of time?

A. No, she was very regular

Q. Were you ever present when she was questioned by the police? A. Never.

(Deposition of Lars Pedersen Tillitse.)

Q. All you know concerning her interrogation by the police was what she told you herself?

A. Yes. It was so customary at that time that anybody who had anything to do with foreigners would be questioned. All of my Japanese servants were questioned, too.

Q. During the entire time that Miss Toguri worked for you she concealed the fact that she was a member and doing broadcasting [5] work at Radio Tokyo?

A. She never told me about it.

Q. That is all.

/s/ L. TILLITSE.

Japan,

City of Tokyo,

American Consular Service—ss.

I do solemnly swear that I will truly and impartially take down in notes and faithfully transcribe the testimony of Lars Pedersen Tillitse, a witness now to be examined. So help me God.

/s/ IRENE CULLINGTON.

Subscribed and sworn to before me this 17th day of May, A.D. 1949.

/s/ THOMAS W. AINSWORTH,

Vice Consul of the

United States of America.

[American Consular Service Seal]

Service No. 904a; Tariff No. 38; No fee prescribed.

Japan,
City of Tokyo,
American Consular Service—ss.

CERTIFICATE

I, Thomas W. Ainsworth, Vice Consul of the United States of America in and for Tokyo, Japan, duly commissioned and qualified, acting under the authority of a certain stipulation for taking oral designations abroad, and upon order of the United States District Court, made and entered March 22, 1949, in the Matter of United States of America, plaintiff, vs. Iva Ikuko Toguri D'Aquino, Defendant, pending in the Southern Division of the United States District Court, for the Northern District of California, and at issue between United States of America vs. Iva Ikuko Toguri D'Aquino, do hereby certify that in pursuance of the aforesaid stipulation and court order and at the request of Theodore Tamba, counsel for the defendant Iva Ikuko Toguri D'Aquino, I examined Lars Pedersen Tillitse, at my office in Room 335, Mitsui Main Bank Building, Tokyo, Japan, on the seventeenth day of May, A.D. 1949, and that the said witness being to me personally known and known to me to be the same person named and described in the interrogatories, being the accredited Diplomatic Representative of the Kingdom of Denmark to the Supreme Commander for the Allied Powers, declared that he had received the permission of his Government to waive his diplomatic immunity to give testimony in this cause; and

that administering of the oath to the witness being waived by oral stipulation between Noel Storey, appearing for the plaintiff, and Theodore Tamba, appearing for the defendant, his evidence was taken down and transcribed under my direction by Irene Cullington, a stenographer who was by me first duly sworn truly and impartially to take down in notes and faithfully transcribe the testimony of the said witness Lars Pedersen Tillitse, and after having been read over by him and he having declared that the transcription was correct without alteration was subscribed by him in my presence; and I further certify that I am not counsel or kin to any of the parties to this cause or in any manner interested in the result thereof.

In witness whereof, I have hereunto set my hand and seal of office at Tokyo, Japan, this twenty-first day of May, A.D. 1949.

/s/ THOMAS W. AINSWORTH,
Vice Consul of the
United States of America.

[American Consular Service Seal]

Service No. 957; Tariff No. 38; No fee prescribed.

[Endorsed]: Filed May 26, 1949.

In the Southern Division of the United States District Court for the Northern District of California.

No. 31712 R

UNITED STATES OF AMERICA,

Plaintiff.

vs.

IVA IKUKO TOGURI D'AQUINO,

Defendant.

DEPOSITION OF K. W. AMANO

Deposition of K. W. Amano, taken before me, Thomas W. Ainsworth, Vice-Consul of the United States of America, in Mitsui Main Bank Building, Room 335, in Tokyo, Japan, under the authority of a certain stipulation for taking oral designations abroad, and upon order of the United States District Court, made and entered March 22, 1949, in the Matter of the United States of America vs. Iva Ikuko Toguri D'Aquino, pending in the Southern Division of the United States District Court, for the Northern District of California, and at issue between the United States of America vs. Iva Ikuko Toguri D'Aquino.

The plaintiff appearing by Frank J. Hennessy, United States District Attorney; Thomas DeWolfe, Special Assistant to the Attorney General; and Noel Storey, Special Assistant to the Attorney General; and the defendant, appearing by Wayne N. Collins and Theodore Tamba.

The said interrogations and answers to the witness

thereto were taken stenographically by Mildred Matz and were then transcribed by her under my direction, and the said transcription being thereafter read over correctly to the said witness by me and then signed by said witness in my presence.

It is Stipulated that all objections of each of the parties hereto, including the objections to the form of the questions propounded to the witness and to the relevancy, materiality and competency thereof, and the defendant's objection to the use of the deposition, or any part of the deposition, by plaintiff, on the plaintiff's case in chief, shall be reserved to the time of trial in this cause.

K. W. AMANO

of Tokyo, Japan, physician and surgeon, of lawful age, being by me duly sworn, deposes and says:

Direct Examination

By Mr. Tamba:

Q. Dr. Amano, you were born in Japan, is that correct? A. Yes.

Q. And your profession is that of physician and surgeon? A. Yes.

Q. Where did you get your medical training?

A. In Japan and in the States.

Q. What schools did you attend in the United States, if any?

A. University of Pennsylvania

Q. How long were you at the University of Pennsylvania?

(Deposition of K. W. Amano.)

A. From 1929 to 1932. I got a Degree of Doctor of Science in Medicine there.

Q. Have you practiced medicine in the United States? A. Yes.

Q. And where, sir?

A. In Seattle from '25, 1925 to 1929, and Los Angeles, '32 to '34.

Q. Are you a member of any medical society in the United States?

A. I was a member of the American Medical Association and the American Academy of Ophthalmology and Otolaryngology. [2*]

Q. In the language of the layman, you were a specialist of eyes, throat, nose and ear ailments?

A. Yes.

Q. And that is what those terms mean, isn't that so, Doctor? A. Yes.

Q. Have you been a member of any state medical societies in the United States?

A. Yes, in the state of Washington.

Q. Are you a member of the California State Medical Society, or were you a member?

A. Let me see, I did practice two years, it's so long since I came back, and after doing research at the University of Pennsylvania, I dropped the connection with the state medical society, I had not joined, I think, but I did have a connection with the College of Medical Evangelists teaching.

Q. Were you connected with any schools?

* Page numbering appearing at bottom of page of original Reporter's Transcript.

(Deposition of K. W. Amano.)

A. At the College of Medical Evangelists as instructor, and University of Southern California Medical School.

Q. Doctor, since you won't be in the states as a witness in this case, I want to ask you some other questions. You are a personal friend, and have been physician to Ambassador Grew, isn't that so?

A. Yes.

Q. You and your wife have treated him and his wife? A. Yes.

Q. And you are the doctor he mentioned in his book?

A. Yes, my wife's name is mentioned as she gave the typhoid injection.

Q. And your wife is also a physician and surgeon? A. Yes.

Q. And she was educated in the United States, although born in Japan? [3]

A. Yes, born in Japan.

Q. And you have traveled extensively and studied in other foreign countries? A. Yes.

Q. What other foreign countries?

A. France, Italy, Germany and Austria, and England, I mean, excuse me.

Q. And in your discussion with me prior to coming here to the Diplomatic Section, you took the position that you were neither pro-Japanese, nor pro-American, but an internationalist.

A. Of course, my education is in both America and as a Japanese race, what should I say, I am

(Deposition of K. W. Amano.)

Japanese in some way and in some way I am American, too, but as a medical scientist I am an internationalist.

Q. Doctor, prior to the war and during the war you treated the foreign nationals in Japan, is that correct?

A. Yes, the last fifteen years from 1934 we had a connection with all foreign diplomats, missionaries and business men.

Q. And how many different classes of foreign nationals did you treat, can you tell us approximately?

A. American, British, Belgian and I think about twenty-five other foreign missions, embassies and legations, and practically all countries.

Q. Do you know a person by the name of Iva Toguri also known as Iva D'Aquino.

A. Yes, I knew her since she came here, to Japan, I understand——

Q. And when did you first treat her medically?

A. Right after she arrived to Japan. That was around, I cannot recall the date but in 1941, I think.

Q. What kind of treatment did you administer then?

A. Typhoid injections.

Q. After the war did you treat Mrs. D'Aquino again professionally? [4]

A. You mean during the war. After the war broke out?

Q. Yes. A. Yes.

Q. What was her ailment?

A. She had sinus infection, connected with the

(Deposition of K. W. Amano.)

ear, otitis media, and sinus and beri-beri, connected with malnutrition.

Q. Now, during the course of treatment, did you have occasion to become quite well acquainted with the defendant? A. Yes.

Q. Did you have occasion to discuss the war with her? A. Yes.

Q. Or the progress of the war with her from time to time? A. Yes.

Q. Was that several times, doctor?

A. Yes, I think so. That was around the time of the battle for the Philippines, or a sea battle, which year I cannot recall.

Q. In your meetings with her and discussion of the war did you form an opinion or conclusion as to her allegiance to the United States of America?

A. Yes, that is definite.

Q. What was her allegiance, was she pro-American or pro-Japanese?

A. Her attitude was entirely definitely American.

Q. Can you recall anything in those discussions to indicate that she was definitely American?

A. Because whatever she is, American or Japanese, one is not supposed to tell anything against or about Japanese defeat.

Q. Did she mention that the Japanese would be defeated? A. Yes.

Q. Doctor, what became of the records of your treatment of her and other foreign nationals during the war? What did you do with those records?

(Deposition of K. W. Amano.)

A. Before I evacuated from Tokyo I discarded them because the [5] Kempei-tai might use it against them, my patients, and also for myself.

Q. In other words, those records were all destroyed? A. Yes.

Q. Did either you or your wife have occasion to treat the defendant and her husband after the war? A. Yes.

Q. What treatment was administered to them?

A. 1947, after she came out of prison she came for—Mr. D'Aquino came for ear and nose treatment and Mrs. D'Aquino came for pregnancy check by my wife.

Q. That was after she got out of Sugamo Prison?

A. Yes and we treated her until her nine months of pregnancy.

Q. You say you evacuated from Tokyo, where did you go? A. To Karuizawa.

Q. Was that the place where foreign nationals were interned? A. Yes.

Q. And you treated foreign nationals there?

A. Yes.

Q. Were you checked by the Kempei-tai there?

A. We were always checked and once I was ordered to come down to Tokyo, but I refused, and they came to Karuizawa to quiz for two days.

Q. In your discussions with Mrs. D'Aquino you knew that she had access to foreign or allied news broadcasts, didn't you, Doctor? A. Yes.

Q. She told you that? A. Yes.

(Deposition of K. W. Amano.)

Q. And at one time in the summer of 1944 you left her in charge of your home?

A. Of the clinic, yes, to stay.

Q. How long did she stay there? [6]

A. I forgot, but just one summer season or probably between two or three months. That was in 1943, two or three, I cannot recall that.

Q. Doctor, did you have any knowledge of her having trouble, financially?

A. Yes, that is how she got the job in the broadcasting station, she told me.

Q. She was having financial difficulties?

A. Because her money was cut off, her communication from her father.

Q. Did she ever tell you she hated Japan and wished she had been back in America?

A. I cannot recall whether she mentioned that but she was not so happy here, I am sure, because she had the difficulty of life here.

Cross-Examination

By Mr. Storey:

Q. Doctor, were you ever an American citizen?

A. Me?

Q. Yes.

A. As you know, Japanese not allowed to naturalize—Japanese cannot naturalize, that is why I came back with a return permit. I entered the country before 1924 so I could stay there forever. So as an alien I could stay, but I came to Japan.

(Deposition of K. W. Amano.)

I was invited by the university so I came with a return permit. Still I hold that.

Q. Doctor, when did you leave Tokyo and your clinic?

A. I think March, 1943. The year the war broke out, and in '42 I treated all the Americans, that was June, when the Americans left. In 1944 after Italy surrendered, in February the Ambassador's wife came and stayed until summer. Toguri stayed before that year, I think. No, after that Toguri stayed.

Q. How often did you return to Tokyo after you moved from Tokyo? A. Oh, once a week.

Q. Did you stay long in Tokyo when you came?

A. Just two or three days. I had to see the patients, and later I could come only once a month to see if the house was standing or burned.

Q. Did you see Mrs. D'Aquino there often during the time you returned to Tokyo, after you left?

A. One summer she stayed, and I think that year I treated her, but I don't know how often I saw her but I think not less than twenty times I think during the war. I saw her in Karuizawa. She came for the shots or for the certificates. Yes, for the vitamin shots she came to Karuizawa.

Q. What year was that?

A. We stayed two years. When she was there I cannot remember, but during the war.

Q. How far is Karuizawa from Tokyo?

A. About four hours ride on the train.

(Deposition of K. W. Amano.)

Q. Was it true that people had to have permission during those days to travel?

A. For the foreign nationals only, but Japanese could go without permit.

Q. How often did Miss Toguri come to Karuizawa?

A. I think she dropped in two or three times. She said she was staying at Mrs. Tillitse, the Danish Minister's house. I think she was working there at that time. She was working there at the same time she was working at the broadcasting station. I don't know exactly about her job. Yes, she mentioned that she was working there.

Q. Doctor, give us your best recollection as to the number of times Mrs. D'Aquino discussed the war with you during the war. Was it once or twice, or two or three times?

A. She came up with a Filipino prisoner of war, Mr. Reyes, as a patient. Of course a couple of times only, so we discussed it [8] not only on that occasion but whenever she came we discussed, maybe three or four times.

Q. And you gained the idea that she was pro-American from these discussions you had with her? During those three or four discussions?

A. Yes.

Re-Direct Examination

By Mr. Tamba:

Q. Do you know if Tillitse's wife had a summer home in Karuizawa? A. Yes.

(Deposition of K. W. Amano.)

Q. Doctor, you say she was at Mr. Tillitse's home in Karuizawa when she called on you?

A. Yes.

Q. You mentioned this Italian woman you took into your home. Why did you take her into your home?

A. She had a great difficulty and discomfort in living in the Italian camp.

Q. How long did you keep her there?

A. February to—about six months.

Q. Were you interviewed by the Kempei-tai because you had her in your home?

A. Not for that because she still—a Metropolitan Police Board official arranged with the regular policeman for the benefit of her because she was a nervous wreck and she needed treatment and we took her in our place but finally the head of the Metropolitan Police Board came and took her back to the camp against her will.

Re-Cross-Examination

By Mr. Storey:

Q. You have mentioned an internment camp at Karuizawa——

A. No, I mean internment camp at Denenchofu for the Italians but there was no internment camp in Karuizawa. Karuizawa was an open place for the German refugees, from the East Indies, and [9] half of the Soviet Embassy people evacuated from here and was allowed to stay at Hotel Mampei, not internment, and they went back to, I think they

(Deposition of K. W. Amano.)

went to Hakone when the war broke out, but in the beginning they moved to Karuizawa. We delivered a few Soviet babies.

Q. Was there an internment camp where these people were gathered and put into some camp and were guarded?

A. Yes. Italians, because since Mussolini's government dropped these people of the Embassy was taken, except those four Bodolio—some commercial attache was investigated afterwards but all taken first to the camp.

/s/ K. W. AMANO.

Japan,
City of Tokyo,
American Consular Service—ss.

I do solemnly swear that I will truly and impartially take down in notes and faithfully transcribe the testimony of K. W. Amano, a witness now to be examined. So help me God.

/s/ MILDRED MATZ.

Subscribed and sworn to before me this 2nd day of May, A.D. 1949.

/s/ THOMAS W. AINSWORTH,
Vice Consul of the
United States of America.

[American Consular Service Seal.]

Service No. 733a; Tariff No. 38; No fee prescribed.

Japan,
City of Tokyo,
American Consular Service—ss.

CERTIFICATE

I, Thomas W. Ainsworth, Vice Consul of the United States of America in and for Tokyo, Japan, duly commissioned and qualified, acting under the authority of a certain stipulation for taking oral designations abroad, and upon order of the United States District Court, made and entered March 22, 1949, in the Matter of United States of America, Plaintiff, vs. Iva Ikuko Toguri D'Aquino, Defendant, pending in the Southern Division of the United States District Court, for the Northern District of California, and at issue between United States of America vs. Iva Ikuko Toguri D'Aquino, do hereby certify that in pursuance of the aforesaid stipulation and court order and at the request of Theodore Tamba, counsel for the defendant Iva Ikuko Toguri D'Aquino I examined K. W. Amano, at my office in Room 335, Mitsui Main Bank Building, Tokyo, Japan, on the second day of May, A.D. 1949, and that the said witness being to me personally known and known to me to be the same person named and described in the interrogatories, being by me first sworn to testify the truth, the whole truth, and nothing but the truth in answer to the several interrogatories and cross-interrogatories in the cause in which the aforesaid stipulation, court order, and

request for deposition issued, his evidence was taken down and transcribed under my direction by Mildred Matz, a stenographer who was by me first duly sworn truly and impartially to take down in notes and faithfully transcribe the testimony of the said witness K. W. Amano, and after having been read over and corrected by him, was subscribed by him in my presence; and I further certify that I am not counsel or kin to any of the parties to this cause or in any manner interested in the result thereof.

In witness whereof, I have hereunto set my hand and seal of office at Tokyo, Japan, this 19th day of May, A.D. 1949.

/s/ THOMAS W. AINSWORTH,
Vice Consul of the
United States of America.

[American Consular Service Seal.]

Service No. 933; Tariff No. 38; No fee prescribed.

In the Southern Division of the United States
District Court for the Northern District of
California.

No. 31712 R

UNITED STATES OF AMERICA,
Plaintiff,

vs.

IVA IKUKO TOGURI D'AQUINO,
Defendant.

DEPOSITION OF UNAMI KIDO

Deposition of Unami Kido, taken before me, Thomas W. Ainsworth, Vice Consul of the United States of America, in Mitsui Main Bank Building, Room 335, in Tokyo, Japan, under the authority of a certain stipulation for taking oral designations abroad, and upon order of the United States District Court, made and entered March 22, 1949, in the Matter of the United States of America vs. Iva Ikuko Toguri D'Aquino, pending in the Southern Division of the United States District Court, for the Northern District of California, and at issue between the United States of America vs. Iva Ikuko Toguri D'Aquino.

The plaintiff appearing by Frank J. Hennessy, United States District Attorney; Thomas DeWolfe, Special Assistant to the Attorney General, and Noel Storey, Special Assistant to the Attorney General, and the defendant, appearing by Wayne N. Collins and Theodore Tamba.

It appearing that the witness Unami Kido could not intelligently testify in the English language and did well understand the Japanese language, one Nobuo Nishimori, who also well understands said language, was employed as interpreter, and was sworn in as follows:

“You do solemnly swear that you know the English and Japanese languages and that you will truly and impartially interpret the oath to be administered and interrogatories to be asked of Unami Kido, a witness now to be examined, out of the English language into the Japanese language, and that you will truly and impartially interpret the answers of the said Unami Kido thereto out of the Japanese language into the English language, so help you God.”

The said interrogatories and answers of the witness thereto were taken stenographically by Irene Cullington and were then transcribed by her under my direction, and the said transcription being thereafter read over correctly to the said witness by me and then signed by said witness in my presence.

It is stipulated that all objections of each of the parties hereto, including the objections to the form of the questions propounded to the witness and to the relevancy, materiality and competency thereof, and the defendant's objections to the use of the deposition, or any part of the deposition, by plaintiff, on the plaintiff's case in chief, shall be reserved to the time of trial in this cause.

UNAMI KIDO

of Tokyo, Japan, of lawful age, being by me duly sworn, deposes and says:

Direct Examination

By Mr. Tamba:

Q. Mrs. Kido, what is your occupation?

A. Housewife.

Q. Mrs. Kido, what is your husband's name?

A. Mitsuyoshi Kido.

Q. Where was he during the war? [2*]

A. He was in Manchuria.

Q. Do you know a man by the name of Katsuo Okada? A. Yes, I do.

Q. How long have you known him?

A. About seven, eight or probably ten years.

Q. Is he a friend of your husband?

A. They hail from the same place.

Q. Do you know a woman by the name of Iva Toguri D'Aquino? A. Yes.

Q. When did you first meet her?

A. I first met her on October 25, 1944, and she has been living at my place since the 27th of that month.

Q. Was that the first time you met her?

A. Yes.

Q. Did she come to see you about getting a room at your house?

A. She came back from America with a niece of a "go-between" whom I know. My husband

* Page numbering appearing at bottom of page of original Reporter's Transcript.

(Deposition of Unami Kido.)

was away in Manchuria and my children were sent to the country, so this "go between" asked me to rent a room for them.

Q. This man was the "go between" for you and your husband? A. Yes.

Q. Is it the custom among Japanese to ask the advice of a "go between" with respect to anything they do?

A. Yes, in my case I consulted the "go between" because my husband had requested it.

Q. Did your "go between" tell you to take Iva in as a roomer?

A. The "go between" told me I ought to be lonesome and that I had a large house, so how about taking her in.

Q. Did you discuss the question of Mrs. D'Aquino moving in with Mr. Okada?

A. Regarding taking these people in my house, I told Mr. Okada that we were reprimanded for even sympathizing with prisoners [3] of war, and Mr. Okada, being a kempei, I asked him whether it would be feasible to accommodate these persons.

Q. What did Mr. Okada tell you?

A. Mr. Okada said that she, being a woman, wouldn't do anything particularly bad, so I would be able to keep her.

Q. When you refer to "she being a woman" you mean Iva? A. Yes.

Q. Did Okado tell you he would do anything to protect you?

A. What do you mean by "protect you"?

(Deposition of Unami Kido.)

Q. Did he tell you that he would come around your place often so no suspicion would be had?

Mr. DeWolfe: Objected to as hearsay and incompetent, Your Honor.

The Court: Objection sustained.

(A. He said that she is an American citizen, in other words a Nisei, so I will come around here once in a while.)

Q. Did Mr. Okada come around your home once in a while when Iva was living there?

A. He came around about once a week, and depending upon his duty, he came around once in two weeks.

Q. Do you remember, Mrs. Kido, when the Kempei came to your home and Okada was there?

A. Yes.

Q. What did Okada say to the Kempei-tai?

Mr. DeWolfe: Object to that as hearsay, incompetent.

The Court: Objection sustained.

(A. I heard it later from Mr. Okada that he said to the Kempei-tai, "She is a relative of mine, so leave that to me.")

Q. Did you see Okada talk to the Kempei-tai at that time? A. No, I did not see.

Q. Do you remember the Kempei-tai coming around and making inquiry about your husband?

A. Yes, they came around but I was absent, so they inquired of my niece.

Q. Your niece told you about it? A. Yes.

(Deposition of Unami Kido.)

Q. Did you talk to Iva D'Aquino about that afterwards? [4]

A. I didn't know this Kempei came to inquire about Iva. I thought he came to inquire about my husband.

Q. Did Iva tell you that the Kempei-tai were not inquiring about your husband but were inquiring about her?

A. Yes. I told Iva that I was worried about something my husband had done in Manchuria, and at that time she told me that the Kempei-tai were inquiring about her, Iva.

Q. Did the police come to your home and ask about Iva?

A. They just asked whether or not Iva was home?

Q. How often did the police come there?

A. About two or three times a month.

Q. Did you ever see Iva talk with Mr. Okada?

A. Yes.

Q. And that was in your home? A. Yes.

Q. Philip D'Aquino came to live in your home later, is that right? A. Yes.

Q. And he and Iva were married?

A. Yes; they lived together after they were married.

Q. Did you have any trouble with your relatives next door because you gave Iva a room?

Mr. DeWolfe: Object to that as incompetent, irrelevant and immaterial.

The Court: Objection sustained.

(Deposition of Unami Kido.)

(A. Yes.)

Q. What did your relatives say to you about Iva?

Mr. DeWolfe: Objected to as hearsay and incompetent.

The Court: Objection sustained.

(A. You mean because she stayed in my room?)

Q. Did they say anything about Iva being pro-American?

Mr. DeWolfe: Same objection, Judge.

The Court: Same ruling.

(A. Yes.)

Q. Did they tell you you should not have her there?

Mr. DeWolfe: Object to that as immaterial and hearsay.

The Court: Objection sustained.

(A. They didn't think it advisable to have such people in my home.)

Q. Your relatives don't talk to you, even today, is that correct, Mrs. Kido, over Iva?

Mr. DeWolfe: Object to that as incompetent, irrelevant and immaterial, hearsay.

The Court: Objection sustained.

(A. That's correct.) [5]

Q. Why did you take Iva into your home?

A. As I said before, my "go between" had made the request.

Q. Did you tell me, Mrs. Kido, before coming here about an hour ago, that the reason you wanted Iva there was because you wanted to help

(Deposition of Unami Kido.)

a foreigner in a strange land, because your husband was away from home?

Mr. DeWolfe: Object to that as incompetent, hearsay.

The Court: Objection sustained.

(A. Yes, my husband was on foreign soil and I understood her position.)

Mr. DeWolfe: Object to that as incompetent, hearsay.

The Court: Objection sustained.

Q. Did you ever hear the neighbors call Iva a spy?

A. When there were air raids there was confusion and for that reason I heard that people said such things, but I did not hear it directly.

Q. Did you hear anybody call Iva a spy because she had a Christmas tree at one time?

Mr. DeWolfe: Object to that as calling for a conclusion, hearsay, incompetent, sir.

The Court: The objection will be sustained.

(A. Yes.)

Q. Do you know what kind of work Iva was doing during the time of the war?

A. I knew that she was going to the broadcast station, but I did not know what kind of work she was doing.

Q. Do you remember Iva remaining away from the broadcasting station?

A. Yes, I remember.

Q. Do you remember Iva receiving a card from the broadcasting station?

(Deposition of Unami Kido.)

A. Yes, I read it to her.

Q. What did the card say, if you remember?

A. It just said to come to work.

Q. Did she go to work?

A. I can't recall clearly, but I think she did not go out immediately, but I think she went out two or three days later.

Q. Do you remember a man coming to your home from the [6] broadcasting station?

A. She did not go after receiving a letter, so a person came.

Q. Did he order her to return to work?

A. I do not know because he met Iva.

Q. Did you know the man's name?

A. I remember it was a man, but I don't know the name.

Q. Do you remember Iva remaining away from the broadcasting station? A. Yes.

Q. For how long a period did she remain away from the broadcasting station?

A. She was absent most of the time from April.

Q. What year? A. 1945.

Q. Did Iva ever discuss the war with you?

A. It was not exactly a discussion, but she said there was no chance of Japan winning the war.

Q. Did you buy things on the black market during the war? A. Yes, I did.

Q. For yourself and Iva?

A. Yes; at first I bought for myself and for Iva. Later Iva was taking it out. She once told

(Deposition of Unami Kido.)

me that it was secret and not to reveal to anyone because I would get in trouble as well as she. And I asked her what was the matter and she said she was taking it to sick prisoners of war.

Q. When she left your home on these occasions, did she leave with a bag?

A. Yes, she always carried a bag.

Q. And was that full?

A. There might have been some cosmetic kit in it, also.

Q. Do you know if Iva ever bought war bonds?

A. No, she did not buy them. [7]

Q. Did she ever collect metal ware, old clothes or cotton to help the war effort?

A. She never did.

Cross-Examination

By Mr. Storey:

Q. Mrs. Kido, were you ever present when Iva was questioned by the Kempei?

A. At home you mean?

Q. At any place? A. No.

Q. Mrs. Kido, were you ever present when Iva was questioned by the police?

A. The police authority came two or three times a month, but when they did talk, I don't know what they talked about.

Q. Mrs. Kido, were you ever present in your home when the police talked to or questioned Miss D'Aquino?

(Deposition of Unami Kido.)

A. I was in the house, but I do not know what they talked about.

Q. Did the Kempei ever question you about Mrs. D'Aquino while she lived at your house?

A. The Kempei-tai did not talk to me directly but they did talk to Mr. Okada and Okada told them that "this is the home of one of my relatives, so let me handle this matter." Then after that the Kempei did not come to my home.

Q. Did Mrs. D'Aquino know that Mr. Okada was a member of the Kempei-tai?

A. I told her.

Q. Was Mrs. D'Aquino friendly with Mr. Okada?

A. He was my relative and we all talked to him.

Q. Were Mrs. D'Aquino and Mr. Okada friends?

A. I introduced them and I do not know whether you would call that friends or not.

Q. Did Mrs. D'Aquino have any conversations with Mr. Okada?

A. They never talked when they were [8] alone.

Q. Did Mr. Okada know that you and Iva were buying food on the black market?

A. Everybody was buying on the black market and we talked of those things openly.

Q. So, Mr. Okada knew that you were buying food for Iva on the black market? A. Yes.

Q. Was this food that you bought on the black market expensive?

(Deposition of Unami Kido.)

A. Not necessarily too high, but it wasn't the official price.

Q. Did the food you bought on the black market cost more than the food you bought on your food ration coupons? A. Yes.

Q. Did Mrs. D'Aquino furnish you with any of this money to buy food on the black market?

A. Yes.

Q. Did you ever see Mrs. D'Aquino deliver any food to prisoners of war?

A. No, I did not see her deliver food to the prisoners of war, but I have seen her carrying foods.

Q. Mrs. Kido, you have testified that Mrs. D'Aquino received a card from the radio station directing her to return to work?

A. Yes, when she was away.

Q. Was this card requesting Miss Toguri to return to work or directing her to return to work?

A. You will return to work (Shutto Seyo).

Q. Who signed this card, Mrs. Kido?

A. It was written by the American Section.

Q. Did Mrs. D'Aquino report to work immediately after receiving this order?

A. No, she did not go immediately.

Q. Who was the man who came to your house after receiving this card? [9]

A. I forgot the name, but a man did come.

Q. Who did he talk to?

A. First he asked me if Iva was home. Then he talked to her.

(Deposition of Unami Kido.)

Q. Did he talk to Mrs. D'Aquino?

A. I called Iva downstairs but I don't know what they talked about.

Q. Was this man from the radio station?

A. Yes, I think he was from the American Section.

Q. Did the man tell you he was from the American Section of the radio station?

A. He said he was from the broadcasting station.

Q. Did he tell you what he wanted to talk to you about?

A. He just asked me whether or not Iva was in.

Q. Were you present when the man from the radio station talked to Mr. and Mrs. D'Aquino?

A. I was present when he met Iva, but do not know what they talked about. I do not know whether Philip was there or not.

Q. That is all.

Re-Direct Examination

By Mr. Tamba:

Q. Was this man a fat man, if you remember, Mrs. Kido?

A. He wasn't very tall; I would say rather that he was a small fellow.

Q. Was he a thin man?

A. Yes, he was a thin person; he wasn't fat.

Q. Did he have curly hair or straight hair, if you remember?

(Deposition of Unami Kido.)

A. I did not observe that close; I just remember that he was a man and small in stature.

Q. Mrs. Kido, was Iva at home when the police used to call two or three times a month?

A. She met them about twice and the rest of the time I talked to the police.

Q. In other words, the rest of the time Iva wasn't home? A. Yes.

Q. That is all. [10]

Japan,

City of Tokyo,

American Consular Service—ss.

I do solemnly swear that I will truly and impartially take down in notes and faithfully transcribe the testimony of Unami Kido, a witness now to be examined. So help me God.

/s/ IRENE CULLINGTON.

Subscribed and sworn to before me this 13th day of May, A.D. 1949.

/s/ THOMAS W. AINSWORTH,

Vice Consul of the

United States of America.

[American Consular Service Seal.]

Service No. 874a; Tariff No. 38; No fee prescribed.

Japan,
City of Tokyo,
American Consular Service—ss.

CERTIFICATE

I, Thomas W. Ainsworth, Vice Consul of the United States of America in and for Tokyo, Japan, duly commissioned and qualified, acting under the authority of a certain stipulation for taking oral designations abroad, and upon order of the United States District Court, made and entered March 22, 1949, in the Matter of United States of America, Plaintiff, vs. Iva Ikuko Toguri D'Aquino, Defendant, pending in the Southern Division of the United States District Court, for the Northern District of California, and at issue between United States of America vs. Iva Ikuko Toguri D'Aquino, do hereby certify that in pursuance of the aforesaid stipulation and court order and at the request of Theodore Tamba, counsel for the defendant Iva Ikuko Toguri D'Aquino, I examined Unami Kido, at my office in Room 335, Mitsui Main Bank Building, Tokyo, Japan, on the thirteenth day of May, A.D. 1949, using as interpreter Nobuo Nishimori, who was by me first duly sworn truly and impartially to interpret the oath to be administered and interrogatories to be asked of the witness out of the English into the Japanese language, and truly and impartially to interpret the answers of the witness thereto out of the Japanese language into the English language; and that the said witness being to me personally

known and known to me to be the same person named and described in the interrogatories, being by me first sworn to testify the truth, the whole truth, and nothing but the truth in answer to the several interrogatories and cross-interrogatories in the cause in which the aforesaid stipulation, court order, and request for deposition issued, her evidence was taken down and transcribed under my direction by Irene Cullington, a stenographer who was by me first duly sworn truly and impartially to take down in notes and faithfully transcribe the testimony of the said witness Unami Kido, and after having been read over and interpreted to, and corrected by her, was subscribed by her in the Japanese language and a Japanese name-stamp, which constitutes a legal signature under Japanese law, affixed in my presence; and I further certify that I am not counsel or kin to any of the parties to this cause or in any manner interested in the result thereof.

In witness whereof, I have hereunto set my hand and seal of office at Tokyo, Japan, this 19th day of May, A.D. 1949.

/s/ THOMAS W. AINSWORTH,
Vice Consul of the
United States of America.

[American Consular Service Seal.]

Service No. 939; Tariff No. 38; No fee prescribed.

[Endorsed]: Filed May 23, 1949.

In the Southern Division of the United States
District Court for the Northern District of
California

No. 31712 R

UNITED STATES OF AMERICA,

Plaintiff,

vs.

IVA IKUKO TOGURI D'AQUINO,

Defendant.

DEPOSITION OF KEN MURAYAMA

Deposition of Ken Murayama, taken before me, Thomas W. Ainsworth, Vice Consul of the United States of America, in Mitsui Main Bank Building, Room 335, in Tokyo, Japan, under the authority of a certain stipulation for taking oral designations abroad, and upon order of the United States District Court, made and entered March 22, 1949, in the Matter of United States of America vs. Iva Ikuko Toguri D'Aquino, pending in the Southern Division of the United States District Court, for the Northern District of California, and at issue between the United States of America vs. Iva Ikuko Toguri D'Aquino.

The plaintiff appearing by Frank J. Hennessy, United States District Attorney; Thomas DeWolfe, Special Assistant to the Attorney General, and Noel Storey, Special Assistant to the Attorney General, and the defendant, appearing by Wayne N. Collins and Theodore Tamba.

The said interrogations and answers of the wit-

ness thereto were taken stenographically by Irene Cullington and were then transcribed by her under my direction, and the said transcription being thereafter read over correctly to said witness by me and then signed by said witness in my presence.

It is Stipulated that all objections of each of the parties hereto, including the objections to the form of the questions propounded to the witness and to the relevancy, materiality and competency thereof, and the defendant's objections to the use of the deposition, or any part of the deposition, by plaintiff, on the plaintiff's case in chief, shall be reserved to the time of trial in this cause.

KEN MURAYAMA

of Tokyo, Japan, a translator, of lawful age, being by me first duly sworn, deposes and says:

Direct Examination

By Mr. Tamba:

Q. State your name, please.

A. Ken Murayama.

Q. Where do you reside?

A. In the city of Tokyo.

Q. What is your business or occupation?

A. I am doing translating work for various motion picture companies.

Q. Are you a citizen and national of Japan?

A. I am.

Q. When did you become a citizen and national of Japan? A. In 1939.

Q. Where were you born?

A. New York City.

(Deposition of Ken Murayama.)

Q. When? A. December 26, 1911.

Q. Did you receive your education in the United States? A. Yes.

Q. What school?

A. High school in Washington, D. C., and graduated from [2*] George Washington University.

Q. When did you come to Japan?

A. In July, 1933.

Q. Have you resided in Japan ever since?

A. Yes, except for trips to China and the Philippines.

Q. Have you ever returned to the United States? A. No.

Q. Do you know a person by the name of Iva D'Aquino, also known as Iva Toguri?

A. I have met and seen Iva Toguri while she was employed in the Domei News Agency.

Q. When was that?

A. I can't recall for sure. It might have been during the first year of the war.

Q. Have you ever seen her since that date?

A. No.

Q. Do you know anything of her activities around radio stations during the years of the war?

A. No, only such things as I have read since.

Q. Do you know anything about a Zero Hour program? A. No, I don't.

Q. Do you know a person by the name of Myrtle Liston? A. Yes.

Q. Where did you meet Miss Liston?

(Deposition of Ken Murayama.)

A. In Manila.

Q. Under what circumstances?

A. She was broadcasting over the Manila radio station to the Southwest Pacific.

Q. Did you or anyone else have any part in the preparation of the script used by Myrtle Liston?

A. Yes, I wrote the scripts Miss Liston broadcast. Mr. Uno also wrote some of the scripts. [3]

Q. What was the nature or tenor of the scripts you wrote for Miss Liston, if you recall?

A. Those scripts were designed to create a sense of homesickness among troops fighting in the Southwest Pacific. Their tone was one of trying to make the soldiers recall certain good times they might have had when they were back in the States. Usually the scripts were along those lines.

Q. Do you recall any script being prepared by you which referred to a short story of a girl at home and a boy friend who was ineligible for the Army?

Mr. DeWolfe: Objected to as incompetent, not the best evidence.

The Court: Submitted?

Mr. Collins: Yes.

The Court: The objection will have to be sustained.

(A. There were several scripts. I can't recall the exact contents, but the general tenor was such as you have mentioned. We had stories, short scripts shall we say, of girls having dates with men at home, while possibly their sweethearts or hus-

(Deposition of Ken Murayama.)

bands might be fighting in the Southwest Pacific area.)

Q. Do you recall anything about malaria, jungle rot, and high cost of living, or scripts of that tenor?

Mr. DeWolfe: Object to that as immaterial and incompetent; hearsay; not the best evidence; irrelevant.

The Court: Objection sustained.

(A. I can't give you any exact quotation regarding malaria or jungle rot, but I am sure some of the scripts must have included diseases which were prevalent in the tropical areas.)

Q. What kind of music did you play on the program?

A. We relied heavily on waltzes—music which tended to be dreamy; usually old pieces.

Q. Were those old pieces introduced with any particular phrase before being played?

A. Yes—Do you remember such and such a piece.

Q. How was that program introduced—with any particular piece of music?

A. I believe the program came on with the playing of "Auld Lang Syne."

Q. How did it end, if you remember?

A. We had some other signature number. I think the word [4] "Aloha" was in it.

Q. Was that program broadcast short wave or locally?

A. It was not broadcast locally but only short wave.

(Deposition of Ken Murayama.)

Q. Can you tell us something about the type of voice Miss Liston had?

A. She had a very good voice from the standpoint of use over the microphone. It was quite low pitched, husky. The sort of voice that would carry well and was in keeping with the general tenor of the program itself.

Q. If she were a singer, in what category would you class her as a singer?

A. A torch singer.

Q. What kind of English did she use?

A. Her English was very good. I don't think she was very well educated, but her pronunciation was very good for a Filipino.

Q. Did you ever see her come to the station intoxicated before a broadcast?

A. Yes, several times.

Q. What did she do with the scripts on those occasions?

A. She got through them all right. She did a very good job on them.

Q. I think that is all.

Q. Do you remember what hour of the day that program came on?

A. I can't say for certain. It might have been 5 or 5:30.

Q. Did you ever announce the station when you broadcast the program?

A. I think we announced it as PIRM.

Q. Do you know if the Japanese Government

(Deposition of Ken Murayama.)

had other broadcasting stations in the Pacific, of your own knowledge.

A. No, I don't know of my own knowledge.

Q. You don't know of one in Shanghai?

A. Yes.

Q. Were you in China during the war? [5]

A. Yes.

Q. Was a woman on that station?

A. I was in Shanghai in the very early days of the war, in the early part of 1942, and at that time I recall an Australian girl who was broadcasting over station XMHA.

Q. Do you know her name?

A. McDonald was her last name. I think her first name was Betty.

Cross-Examination

By Mr. Storey:

Q. How long did you know Miss Toguri?

A. Well, I had only met her several times in the Domei office. I can't say I knew her very well—just to say “hello” to.

Q. Did you know Miss Toguri while she was working at Radio Tokyo?

A. No, not at all. May I add something there?

Q. No, I think that answered the question.

Q. Then you know nothing at all as to the work Miss Toguri was doing at Radio Tokyo?

A. No, I do not. I did not know until the end of the war.

Q. Approximately when did Miss Liston start broadcasting this program from Manila?

(Deposition of Ken Murayama.)

A. As I recall, it was either September of October, 1944. I believe that is right.

Q. How long did Miss Liston continue to broadcast?

A. I believe until the end of January, 1945, or the first days of February. I am not sure.

Q. Did Miss Liston ever refer to herself in these broadcasts by the name of "Ann"?

A. I do not recall any name like that.

Q. Did Miss Liston ever refer to herself as "Orphan Ann" in that program? A. No.

Q. That is all.

/s/ KEN MURAYAMA. [6]

Japan,

City of Tokyo,

American Consular Service—ss.

I do solemnly swear that I will truly and impartially take down in notes and faithfully transcribe the testimony of Ken Murayama, a witness now to be examined. So help me God.

/s/ IRENE CULLINGTON.

Subscribed and sworn to before me this nineteenth day of April, A.D. 1949.

/s/ THOMAS W. AINSWORTH,
Vice Consul of the
United States of America.

[American Consular Service Seal.]

Service No. 589a; Tariff No. 38; No fee prescribed.

Japan,
City of Tokyo,
American Consular Service—ss.

CERTIFICATE

I, Thomas W. Ainsworth, Vice Consul of the United States of America in and for Tokyo, Japan, duly commissioned and qualified, acting under the authority of a certain stipulation for taking oral designations abroad, and upon order of the United States District Court, made and entered March 22, 1949, in the Matter of United States of America, Plaintiff, vs. Iva Ikuko Toguri D'Aquino, Defendant, pending in the Southern Division of the United States District Court, for the Northern District of California, and at issue between United States of America vs. Iva Ikuko Toguri D'Aquino, do hereby certify that in pursuance of the aforesaid stipulation and court order and at the request of Theodore Tamba, Counsel for the defendant Iva Ikuko Toguri D'Aquino, I examined Ken Murayama, at my office in Room 335, Mitsui Main Bank Building, Tokyo, Japan, on the nineteenth day of April, A.D. 1949, and that the said witness being to me personally known and known to me to be the same person named and described in the interrogatories, being by me first sworn to testify the truth, the whole truth, and nothing but the truth in answer to the several interrogatories and cross-interrogatories in the cause in which the aforesaid stipulation, court order, and request for deposition issued, his evi-

dence was taken down and transcribed under my direction by Irene Cullington, a stenographer who was by me first duly sworn truly and impartially to take down in notes and faithfully transcribe the testimony of the said witness Ken Murayama, and after having been read over and corrected by him was subscribed by him in my presence; and I further certify that I am not counsel or kin to any of the parties to this cause or in any manner interested in the result thereof.

In witness whereof, I have hereunto set my hand and seal of office at Tokyo, Japan, this fifth day of May, A.D. 1949.

/s/ THOMAS W. AINSWORTH,
Vice Consul of the
United States of America.

[American Consular Service Seal.]

Service No. 804; Tariff No. 38; No fee prescribed.

[Endorsed]: Filed May 13, 1949.

[Title of District Court and Cause.]

DESIGNATION OF CONTENTS OF
RECORD ON APPEAL

The defendant (appellant) hereby designates that the whole of the record, proceedings and evidence be contained in the record on appeal herein, and more particularly as follows:

1948

Oct. 8—Indictment.

Oct. 11—Minute order entry on arraignment and oral motion for bail and continuing cause to Oct. 14 at 1:00 p.m. for hearing on motion that defendant be admitted to bail.

Oct. 13—Notice of Motion and Motion to be admitted to bail.

Oct. 14—Minute order that defendant's motion for bail be denied and providing that marshal provide suitable place of confinement where defendant will have full opportunity to interview witnesses and consult with counsel.

Oct. 27—Demand for Bill of Particulars.

Nov. 3—Demand for Discovery and Inspection.

Nov. 3—Demand for Additional Bill of Particulars.

Nov. 15—Notice and Motion to Strike.

Nov. 15—Notice and Motion to Dismiss Indictment.

Nov. 15—Notice and Motion for Discovery and Inspection.

1948

Nov. 15—Notice and Motion to Dismiss Indictment on Defenses and Objections Capable of Determination Without Trial of General Issue.

Nov. 15—Affidavit in Support of Motions to Dismiss, etc.

Nov. 15—Notice and Motion for Bill of Particulars.

1949

Jan. 3—Minute order that Motion for Bill of Particulars, Motion to Dismiss Indictment be denied, and that Motion for Discovery and Inspection be granted as to request number 7 but denied as to remaining requests, and that Motion to Strike Indictment be denied.

Jan. 3—Minute order that defendant pleads "Not Guilty" and setting cause for trial on May 16, 1949.

Mar. 1—Motion for Order Authorizing and Directing Issuance of Subpoenas requiring attendance of witnesses in a foreign country at the trial at expense of the Government and for service thereof.

Mar. 14—Minute order that motion to take certain depositions be granted and that remaining motions be denied.

Mar. 15—Order Denying Seven (7) Motions and Granting Defendant's Motion for Taking Depositions Abroad.

1949

Mar. 22—Stipulation to Taking Oral Depositions Abroad.

Apr. 5—Motion for Lists of Witnesses and Veniremen.

Apr. 5—Motion for Order Authorizing and Directing Issuance and Service of Subpoenas Requiring Attendance of Witnesses at Trial Herein at Government Expense.

Apr. 21—Notice and Motion for Postponement of Time of Trial.

Apr. 25—Minute order authorizing issuance and service of subpoenas and motion for list of witnesses and veniremen be continued to May 2, 1949, and ordering case continued from May 16, 1949, to July 5, 1949 for trial.

May 4—Motion for Order Authorizing and Directing Issuance and Service of Subpoenas requiring attendance of witnesses at trial at expense of the Government, and Affidavit in Support thereof.

May 18—Order Granting Defendant's Motion for Order Authorizing and Directing Issuance and Service of Subpoenas of Defendant's Witnesses at Government Expense.

May 18—Order Denying Defendant's Motion for List of Witnesses and Veniremen.

May 24—Motion for Order Authorizing and Directing Issuance and Service of Subpoenas at Government Expense.

1949

June 1—Order Granting Defendant's Motion to Subpoena Albert Rickert and Edwin Kalbfleish, Jr., at Government Expense.

June 16—Notice and Motion for list of witnesses and veniremen.

June 16—Notice and Motion for Supplemental Order authorizing additional subsistence expenses to be paid defendant's counsel for attending examination of witnesses abroad.

June 16—Notice and Motion for Production of Documentary Evidence.

June 20—Order granting motion for Supplemental Order authorizing additional subsistence expenses to be paid by the government to defendant's counsel for attending examination of witnesses abroad.

June 20—Minute order granting plaintiff's motion to quash subpoena duces tecum served on Mr. Hennessy.

June 22—Order requiring plaintiff to supply defendant with lists of witnesses and veniremen.

June 22—Minute order quashing subpoenas duces tecum issued to Mr. DeWolfe, and subpoena No. 148.

June 22—Minute order denying defendant's motion to produce.

June 28—Copy of list of witnesses and jurors.

June 29—Amended witness list.

July 5—Appearance of attorneys.

1949

Aug. 12—Minute entry ordering oral motion for judgment of acquittal continued to August 13, 1949.

Aug. 13—Minute order denying defendant's motion for judgment of acquittal.

Aug. 13—Motion for order for production, examination and inspection of records and script.

Sept. 19—Minute entries of defendant's motions to strike certain testimony, to dismiss indictment and for judgment of acquittal, and minute orders denying the same.

Sept. 26—Minute entry reading "Trial resumed. Jury instructed and retired to deliberate upon its verdict. Ordered alternate juror Aileen McNamara excused from further service. It is ordered that the Marshal furnish meals and lodging for the jurors and 2 deputy marshals. At 11:20 p.m. Jury retired for the night. Ordered continued to September 27, 1949, for further trial."

Sept. 27—Minute entry reading "Trial resumed. Jury requested and received certain portions of transcript and certain exhibits and retired to deliberate its verdict. At 10:15 p.m. the jury retired for the night. Ordered continued to September 28, 1949 for further trial."

1949

Sept. 29—Minute entry reading “Trial resumed. Jury deliberated further upon its verdict. After requesting and receiving certain Volumes of testimony and further instructions and after due deliberation the Jury returned a Verdict of “Guilty.” The jury was thereupon polled. Ordered Jury be discharged from further consideration hereof and be excused, On Motion of Mr. Collins it is ordered that this cause be continued to October 6th for judgment.”

Sept. 29—Special Findings of the Jury finding defendant not guilty on Overt Acts 1, 2, 3, 4, 5, 7 and 8 but guilty on Overt Act No. 6.

Sept. 29—Jury Verdict.

Oct. 3—Motion in Arrest of Judgment.

Oct. 3—Motion for Acquittal or New Trial.

Oct. 3—Motion for New Trial.

Oct. 5—Supplemental Ground in Support of Motion for Acquittal or New Trial.

Oct. 6—Minute order denying defendant’s motions for new trial, acquittal or new trial and in arrest of judgment.

Oct. 6—Minute entry showing defendant was called for judgment.

Oct. 6—Minute entry showing defendant was ordered sentenced and committed to the custody of the Attorney General for imprisonment for a period of 10 years and fined \$10,000.

Formal judgment and commitment.

1949

- Oct. 3—Minute entry showing that there was filed defendant's instructions covered by the court in other instructions and that defendant excepts thereto on grounds they have not been covered.
- Oct. 3—Minute entry showing that there was filed defendant's instructions which were refused by court as not being correct statements of law.
- Oct. 7—Notice and Motion of defendant for admission to bail pending appeal.
- Oct. 7—Order staying execution of sentence to and including October 17, 1949.
- Oct. 7—Affidavit and Order for filing appeal in forma pauperis.
- Oct. 7—Notice of Appeal.

The reporter's transcript of all evidence, oral and documentary, which was stenographically reported and was taken down on behalf of the plaintiff and also on behalf of the defendant, including all oral motions made by the respective parties and orders and rulings of Court made thereon. All exhibits introduced in evidence by either side and all exhibits differed in evidence by the defendant and rejected and subsequently marked exhibits for identification, excepting the following duplications:

Government's Exhibit 1 includes the in-

1949

dictment which may be omitted from the exhibit.

Defendant's Exhibit BP contains duplications of Government's Exhibits 8, 9, 10 and 11; the pages of defendant's Exhibit BP which duplicate such exhibits may be omitted.

The defendant's Exhibit UU contains duplication of defendant's Exhibit B; defendant's Exhibit B may be omitted.

All instructions given to the jury by the Court and all instructions the defendant requested the Court to give to the jury which the Court refused to give to the jury, and also the arguments of counsel to the jury.

All depositions offered or admitted in evidence.

Oct. —Order Releasing Reporter's Transcript.

Oct. —This Designation of Contents of Record on Appeal, and stipulation and order that original exhibits be transmitted to Appellate Court.

/s/ WAYNE M. COLLINS,
/s/ GEORGE OLSHAUSEN,
/s/ THEODORE TAMBA,
Attorneys for Defendant.

Receipt of copy attached.

[Endorsed]: Filed October 11, 1949.

[Title of District Court and Cause.]

ORDER STAYING EXECUTION

Good cause appearing therefor, it is hereby ordered that the sentence and judgment imposed in the above-entitled case on October 6, 1949, be and the same is hereby further stayed to and including the 3rd day of November, 1949.

Dated: October 17, 1949.

/s/ MICHAEL J. ROCHE,
U. S. District Judge.

[Endorsed]: Filed October 17, 1949.

[Title of District Court and Cause.]

ORDER RELEASING REPORTER'S TRANSCRIPT

It is ordered that the Clerk of this Court release to the defendant the reporter's transcript of the evidence and proceedings had at the trial herein for use by the defendant in connection with her appeal to the United States Court of Appeals for the Ninth Circuit from the judgment heretofore entered against her in the above-entitled cause.

Dated: October 17th, 1949.

/s/ MICHAEL J. ROCHE,
U. S. District Judge.

O.K.

/s/ TOM DEWOLFE,
Sp. Asst. to the Atty. Gen.

[Endorsed]: Filed October 17, 1949.

[Title of District Court and Cause.]

STIPULATION AND ORDER THAT ORIGINAL PAPERS AND EXHIBITS BE TRANSMITTED TO THE U. S. COURT OF APPEALS FOR THE NINTH CIRCUIT FOR USE ON APPEAL

It is stipulated between the parties hereto that the original exhibits and papers, including those introduced into evidence and also those marked for identification in the trial herein, shall constitute a part of the record on appeal herein, and that the same shall be transmitted to the U. S. Court of Appeals for the Ninth Circuit for consideration on appeal herein as part of the record on appeal, in lieu of copies thereof.

Dated: October 11, 1949.

/s/ WAYNE M. COLLINS,
/s/ GEORGE OLSHAUSEN,
/s/ THEODORE TAMBA,
Attorneys for Defendant.

/s/ FRANK J. HENNESSY,
/s/ TOM DEWOLF,
Attorneys for Plaintiff.

So Ordered: Oct. 17th, 1949.

/s/ MICHAEL J. ROCHE,
U. S. District Judge.

[Endorsed]: Filed October 17, 1949.

[Title of District Court and Cause.]

DESIGNATION OF ADDITIONAL CONTENTS
OF RECORD ON APPEAL

The defendant (appellant) hereby designates that the following documents also be included in the record on appeal herein, to-wit:

1) Notice of Motion and Motion for Admission of Defendant to Bail Pending Appeal.

2) Minute Order Denying Bail.

3) Order Staying Execution of Charge Dated Oct. 7, 1949 and like Order Dated October 17, 1949.

/s/ WAYNE M. COLLINS,

/s/ GEORGE OLSHAUSEN,

/s/ THEODORE TAMBA,

Attorneys for Defendant.

Receipt of copy attached.

[Endorsed]: Filed October 19, 1949.

[Title of District Court and Cause.]

CERTIFICATE OF CLERK TO
RECORD ON APPEAL

I, C. W. Calbreath, Clerk of the District Court for the United States for the Northern District of California, do hereby certify that the foregoing and accompanying documents and exhibits, listed below, are the originals filed in this Court, or true and correct copies of orders entered on the minutes of this Court, in the above-entitled case, and that they constitute the Record on Appeal herein, as designated by the Appellant, to wit:

Indictment.

Minute Order of October 11, 1948—Arraignment, etc.

Notion of Motion and Motion to be Admitted to Bail.

Minute Order of October 14, 1948—Defendant's Motion for Bail Denied, etc.

Demand for Bill of Particulars.

Demand for Discovery and Inspection.

Demand for Additional Bill of Particulars.

Notice of Motion to Strike and Motion to Strike.

Notice of Motion to Dismiss Indictment and Motion to Dismiss Indictment.—Includes Deft's Ex. No. A (Mo. to Dismiss.)

Notice and Motion for Discovery and Inspection.

Notice and Motion to Dismiss Indictment on Defenses and Objections Capable of Determination Without Trial of General Issue.

Affidavit in Support of Motions to Dismiss.

Notice and Motion for Bill of Particulars.

Minute Order of January 3, 1949—Motions for Bill of Particulars, to Dismiss Indictment and to Strike Indictment Denied—Plea of Not Guilty.

Notice and Motion for Order Authorizing and Directing Issuance of Subpoenas, etc.

Minute Order of March 14, 1949, that Motion to Take Certain Depositions be Granted, etc.

Order Denying Seven Motions etc.,

Stipulations to Taking Oral Designations Abroad.

Notice and Motion for Lists of Witnesses and Veniremen.

Notice and Motion for Order Authorizing and Directing Issuance and Service of Subpoenas, etc.

Notice and Motion for Postponement of Time of Trial.

Minute Order of April 25, 1949—Ordered Issuance of Subpoenas, Continuing Motion for List of Witnesses, etc.

Notice and Motion for Order Authorizing and Directing Issuance and Service of Subpoenas, etc.

Order Granting Defendant's Motions for Order Authorizing and Directing Issuance and Service of Subpoenas, etc.

Order Denying Motion for Lists of Witnesses and Veniremen.

Notice and Motion for Order Authorizing and Directing Issuance and Service of Subpoenas, etc.

Order Granting Defendant's Motion for Order Authorizing and Directing Issuance and Service of Subpoenas to Albert Rickert and Edwin Kalbfleish, Jr., etc.

Motion for Lists of Witnesses and Veniremen.

Motion for Supplemental Order Authorizing Additional Subsistence Expenses, etc.

Motion for Production of Documentary Evidence.

Notice of Motion for Production of Documentary Evidence.

Order Granting Motion for Supplemental Order Authorizing Additional Subsistence, etc.

Minute Order of June 20, 1949—Order Granting Motions to Quash Subpoena Duces Tecum, for Additional Expenses and for List of Witnesses and Veniremen.

Order Requiring Plaintiff to Supply Defendant with Lists of Venireman and Witnesses.

Subpoena to Tom DeWolfe.

Minute Order of June 22, 1949—Quashing Subpoena Duces Tecum and Denying Defendant's Motion to Produce.

Appearance of Attorneys.

Minute Order of August 12, 1949—Continuing Oral Motion for Judgment of Acquittal.

Minute Order of August 13, 1949—Denying Defendant's Motion for Judgment of Acquittal.

Motion for Order for Production, Examination and Inspection of Records and Scripts.

Minute Order of September 19, 1949—Denying Motion to Strike Certain Testimony, To Strike U. S. Exhibits Nos. 2 and 15, To Dismiss Indictment and for Acquittal.

Minute Order of September 26, 1949—Court's

Instructions to the Jury, Alternate Juror Excused, etc.

Minute Order of September 27, 1949—Portions of Transcript and Exhibit Requested and Delivered to Jury, etc.

Minute Order of September 29, 1949—Jury Requested and Received Certain Volumes of Testimony, Further Instructions of the Court, Verdict and Special Findings, etc.

Special Findings by the Jury.

Verdict.

Motion for Arrest of Judgment.

Motion for Acquittal or New Trial.

Motion for New Trial.

Points and Authorities in Support of Motion for New Trial.

Supplemental Ground in Support of Motion Heretofore Filed for Acquittal or for New Trial.

Supplemental Authorities on Motion for New Trial.

Memorandum on Behalf of United States in Opposition to Defendant's Motions for a New Trial, Judgment of Acquittal, and in Arrest of Judgment.

Defendant's Instructions Covered by the Court in Other Instructions.

Defendant's Instructions refused by the Court as Not Correct Statements of the Law.

Minute Order of October 6, 1949—Denying Motion for New Trial, Denying Motion for Acquittal or New Trial, Denying Motion in Arrest of Judgment—Sentence.

Arrest of Judgment—Sentence.

Judgment and Commitment.

Notice of Motion for Admission of the Defendant
To Bail Pending Appeal.

Order Staying Execution.

Affidavit of Defendant re Dispensing With Pay-
ment of Fees and Costs of Printing Record on Ap-
peal.

Order Dispensing With Payment of Fees and
Costs of Printing Record on Appeal.

Notice of Appeal.

Minute Order of October 19, 1949—Denying Mo-
tion for Bail Pending Appeal.

Designation of Contents of Record on Appeal.

Order Staying Execution.

Order Releasing Reporter's Transcript.

Stipulation and Order That Original Papers and
Exhibits Be Transmitted to the U. S. Court of
Appeals, etc.

Designation of Additional Contents of Record on
Appeal.

Reporter's Transcript for November 22, 1948—
Motion to Dismiss, For a Bill of Particulars, To
Strike, and for Discovery and Inspection.

Reporter's Transcript for December 20, 1948—
Hearing on Special Motions of Defendant.

Reporter's Transcript for January 3, 1949.

54 Volumes of Reporter's Transcripts.

Plaintiff's Exhibits Nos. 1 (Also Defendant's
Exhibit A) 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14,
15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28,
29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42,

43, 44, 45, 46, 47, 48, 49, 50, 51, 52, 53, 54, 55, 56, 57, 58, 59, 60, 61, 62, 63, 64, 65, 66, 67, 68, 69, 79, 71 (In the Deposition of J. A. Abranches Pinto), 72, 73, 74, and 75.

Defendant's Exhibits A, (Also Plaintiff's Exhibit No. 7), B, C, D, E, F, G, H, I, J, K, L, M, N, O, P, Q, R, S, T, U, V, W, X, Y, Y-1, Z, Z-1, AA, BB, CC, DD, EE, (in Pinto Deposition), FF (in Pinto Deposition), GG (in Pinto Deposition), HH, (in Pinto Deposition), II, (in Pinto Deposition), JJ (in Pinto Deposition), KK (in Pinto Deposition), LL (in Pinto Deposition), MM, NN, OO, PP, QQ, RR, SS, TT, UU, VV, WW, XX, YY, ZZ, BA, BC, BD, BE, BF, BG, BH, BI, BJ, BK, BL, BM, BN, BO, BP, BQ, BR, BS, (19 Depositions) (Brown Suit—3 pieces—accompanying Deposition of Toshikatsu Kodaira), BT (23 Subpoenas), BU, and BV.

In Witness Whereof, I have hereunto set my hand and affixed the seal of said District Court this 24th day of October, A.D. 1949.

C. W. CALBREATH,

Clerk,

[Seal] /s/ M. E. VAN BUREN,
Deputy Clerk.

[Endorsed]: No. 12383. United States Court of Appeals for the Ninth Circuit. Iva Ikuko Toguri D'Aquino, Appellant, vs. United States of America, Appellee. Transcript of Record. Appeal from the United States District Court for the Northern District of California, Southern Division.

Filed October 24, 1949.

/s/ PAUL P. O'BRIEN,

Clerk of the United States Court of Appeals for
the Ninth Circuit.

No. 12,383

IN THE

United States Court of Appeals
For the Ninth Circuit

Iva Ikuko Toguri d'Aquino,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

BRIEF FOR APPELLANT.

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AUL P. O'BRIEN,

CLERK

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Table of Contents

	Page
Introduction	1
Jurisdiction	2
Detailed statement of facts	2
1. Defendant's personal history	3
2. Defendant's citizenship	16
3. Japanese plan in broadcasting to Allied troops.....	18
4. Contents of defendant's broadcasts	19
a. Scripts and transactions	21
b. Recollection of witnesses	23
5. Alleged confessions and admissions of defendant.....	31
6. Aid to Allied prisoners of war.....	32
7. Technical evidence	32
8. Defendant "brought" under Army guard.....	33
Summary of argument	35
1. Contentions calling for discharge of defendant.....	35
2. Contentions calling for new trial	36
I. Contentions calling for discharge of defendant.....	37
A. Inasmuch as United States permitted naturaliza- tion of its citizens to enemy citizenship during the war, adherence-aid-comfort clause of treason statu- te inoperative	37
1. During recent war U. S. permitted naturaliza- tion to opposite belligerent	38
2. Legal naturalization to enemy in wartime makes adherence-aid-comfort clause inoperative	41
a. Adherence-aid-comfort clause unconstitu- tional under Fifth Amendment	42
b. In view of legalized naturalization to enemy belligerent, adherence-aid-comfort clause unconstitutional under Art. III, sec. 3	46

	Page
3. Same results if U. S. policy was to permit its citizens to become stateless	49
B. Defendant's year-long imprisonment in Japan denied speedy trial—alternative objections.....	50
1. Facts denied speedy trial under Sixth Amendment	52
2. Alternatively, defendant once in jeopardy or case res judicata	52
3. Alternatively prosecution after known loss of evidence violates Fifth Amendment	53
4. Summary	54
C. Defendant's aid to Allied war prisoners creates reasonable doubt as matter of law and makes evidence insufficient	54
1. General rule as to sufficiency of evidence....	55
2. Defensive evidence need only raise reasonable doubt	56
3. Aid to Allied prisoners raises reasonable doubt as to intent	56
D. District Court without jurisdiction	57
1. Introduction	57
2. Defendant brought to U. S. in custody of Army as posse comitatus	59
3. Government cannot establish jurisdiction of District Court by showing own violation of 10 U.S.C. 15	60
a. Authorities supporting rule	60
b. Contrary decisions inapplicable or unsound	62
(1) 10 U.S.C. 15 extends to matters unconnected with Civil War	62
(2) Cases like <i>Pettibone v. Nichols</i> , 203 U.S. 192 and <i>Mahon v. Justice</i> , 127 U.S. 700 not in point	62
(3)-(4) 10 U.S.C. 15 applies though indictment charges acts in Japan.....	67

	Page
E. Summary	72
II. Contentions calling for new trial	72
A. Issue of duress	73
1. Defendant's background situation	73
2. Facts admitted in evidence	74
a. Duress against defendant by persons in authority	75
b. Duress on others by persons in authority—communicated to defendant	79
c. Duress on others by persons in authority—not communicated to defendant.....	81
d. Duress on defendant by persons not in authority	83
e. Defendant's opportunity to quit broadcasting job	84
3. Matters excluded from evidence.....	87
a. b. Exclusion of duress on defendant or on others and communicated to defendant	87
c. Exclusion of evidence of terror over entire Radio Tokyo staff	91
d. Exclusion of duress on others not communicated to defendant	91
4. Instructions given and refused.....	100
a. General rule of duress presented to jury	101
b. Special instruction devitalizing defendant's evidence	103
5. Coercion as defense—rulings on instructions erroneous	104
a. General law of coercion as defense.....	104
b. Under above law instructions given and refused were error	109
c. Summary	116
6. Coercion as defense-rulings on evidence erroneous	117
a. Evidence of official duress brought home to defendant	117

	Page
b. Evidence of duress on defendant by private persons (threats of mob violence)	118
c. Evidence of duress on others not communicated to defendant	118
d. Evidence of state of terror pervading Radio Tokyo staff	120
7. Errors prejudicial	120
8. Summary	121
B. The Geneva Convention	121
1. Operation of treaty as between Government and own citizens	122
2. Applicability of Geneva Convention to defendant	123
a. Geneva Convention applies generally to uninterned civilians	124
3. Applicability of Geneva Convention as between herself and U. S. Government.....	126
4. Defendant's proposed instructions under Geneva Convention erroneously rejected.....	127
5. Summary	129
C. Errors respecting Overt Act 6	129
1. Prejudicial instruction on Overt Act 6.....	132
2. Misconduct of prosecutor	134
D. Confessions of defendant	138
1. Exhibit 24	138
2. Exhibit 15	141
a. Government failed to lay preliminary foundation of voluntariness	141
b. Exhibit 15 obtained by inducements and coercion	143
c. Exhibit 15 violates <i>Upshaw v. U. S.</i> , 335 U. S. 410	145
3. Exhibit 2	147
4. The oral confessions	148

	Page
a. Kramer	148
b. Keeney	150
c. Page	151
d. Fenimore	152
5. Summary	152
E. Cross-examination of defendant	153
1. Erroneous rulings on evidence.....	153
a. Making defendant pass on truthfulness of other witness	153
b. Improper cross-examination on Overt Act 8	164
c. Various erroneous rulings in cross-exami- nation of defendant	168
d. Summary	175
2. Misstatements of record	176
a. Misstatement of Kuroishi's testimony re job application	176
b. Misstatement of defendant's testimony re autographs	177
c. Misstatement of Cousens' testimony	177
d. Recross examination — misrepresentation of Exhibit 9	178
e. Such distortion reversible misconduct....	179
3. Summary	179
F. Identification as "Tokyo Rose"	180
1. Hearsay notations on Exhibits 16-21.....	180
2. Exclusion of defendant's evidence.....	182
3. Summary	184
G. Refusal to produce defendant's witnesses from Japan	184
H. Errors in instructions	186
1. Erroneous instructions given	186
2. Instructions erroneously refused	191
a. Proof of corpus delicti before considering admissions	191

	Page
b. Refusal to expatriate as evidence of intention	192
c. Voluntariness of confessions	192
d. Denial of speedy trial	193
e. No direct evidence Japan was aided.....	194
f. Summary	194
I. Misconduct of prosecutor	194
1. Misconduct in argument to jury.....	195
a. Misuse of Exhibits 52 and 54	195
b. Reference to future prosecution of others	197
c. Distortion of Sugiyama's testimony.....	198
d. Make example of defendant	198
e. Summary	199
2. Misconduct in taking of evidence.....	199
J. Erroneous rulings on evidence	200
1. Exclusion of defensive matter.....	200
a. Evidence that defendant's broadcasts beneficial to U. S. morale, or at least harmless	200
(1) Offered testimony of K. Gupta	201
(2) Exhibit BV for Identification	202
(3) Defendant's program substantially like U. S. broadcasts	203
b. Fraud in preparation of Government's case	205
(1) Fraudulent subpoenas to Government witnesses	205
(2) Bribery of Government witnesses by Brundidge	207
c. Additional proof of intent in helping Allied war prisoners	209
d. Proof of rumors for impeachment	211
e. Proof of other broadcasts	214
f. Defendant's citizenship	215
2. Denial of offers of proof.....	216

	Page
3. Errors of examination of prosecution witnesses	218
a. Limitation of Lee's cross-examination....	219
b. Limitation of Henschel's cross-examination	222
c. Foundation for Moriyama's testimony..	224
d. Other errors in Government's evidence..	224
(1) Mitsushio	224
(2) Ishii	224
(3) Lee's direct examination	225
(4) Nii	225
(5) Villarín	225
(6) Hall	226
(7) Exhibit 25	226
(8) Denial of public trial	226
(9) Exhibit 75	227
(10) "Confidential" exhibits on rebuttal	228
(11) Summary	230
4. Errors on examination of defense witnesses..	230
a. Exclusion of impeaching reputation evidence by Foumy Saisho	230
b. Appeals to race prejudice in cross-examination	231
c. Errors on direct examination of defendant	232
d. Errors on examination of miscellaneous defense witnesses	235
(1) Ince	235
(2) Ito	235
(3) Ito	235
(4) Ito	236
(5) Pray	237
e. Errors in cross-examination of Reyes....	237

III. Conclusion	242
-----------------------	-----

Appendix	follows page 242
----------------	------------------

Table of Authorities Cited

Cases	Pages
Acheson v. Murakami, 176 F. (2d) 953	40, 83, 117, 118, 216
Ah Fook Chang v. U. S., 91 F. (2d) 805	142, 218
Alford v. U. S., 282 U.S. 687	220, 224
Ashcraft v. Tennessee, 327 U.S. 274	140
Barber v. Abo, Nos. 12195-6	40
Bayside Fish Flour Co. v. Gentrey, 297 U.S. 422.....	43
Beck v. U. S., 33 F. (2d) 107	137, 179, App. 68
Berger v. U. S., 295 U.S. 78.....	137, 169, 179, 198, 238, 239
Boske v. Commingore, 177 U.S. 459	229
Bowles v. U. S., 319 U.S. 33	116
Bram v. U. S., 168 U.S. 532	140, 142, 144, 148, 150, 151
Bridges v. Wixon, 326 U.S. 135	195
Burt v. U. S., 139 F. (2d) 73.....	90
Carver v. U. S., 164 U.S. 694	209
Cary v. Curtis, 44 U.S. 236	58
Casey v. U. S., 276 U.S. 413	47
Chandler v. U. S., 171 F. (2d) 921.....	61, 62, 63, 65, 67, 68, 70, 71, 115, 201
Choctaw Nation v. U. S., 318 U.S. 423	123
Citizens Protective League v. Clark, 155 F. (2d) 290.....	124
Cook v. Hart, 146 U.S. 183	64
Cramer v. U. S., 325 U.S. 1	56, 106
Curley v. U. S., 160 F. (2d) 229.....	55
Dalton v. People, 189 P. 37	171
Davis v. U. S., 160 U.S. 469	56
Davis v. U. S., 247 F. 394	227
Denny v. U. S., 151 F. (2d) 828	193
Dooley v. U. S., 182 U.S. 222	67
Driskill v. U. S., 24 F. (2d) 525	84
Ehrhardt v. Stevenson, 128 Mo. App. 476, 106 S.W. 1118..	217
Eureka Hill M. Co. v. Bullion B. & C. M. Co., 32 Utah 236, 90 P. 157	220
Ex parte Endo, 323 U.S. 283.....	83

	Pages
Ex parte Lamar, 274 F. 160	66
Ex parte Sackett, 74 F. (2d) 922	229
Falgout v. U. S., 279 F. 513	56
Fid. & Cas. Co. v. Weise, 182 Ill. 496, 55 N.E. 540	217
Fid. & Cas. Co. v. Weise, 80 Ill. App. 499.....	217
Fink v. O'Neil, 106 U.S. 272	58
Fraser v. U. S., 145 F. (2d) 139	170
Gardner v. Babcock, 70 U.S. 240	133
Gillars v. U. S., 182 F. (2d) 96261, 62, 67, 120, 184, 185, 227	
Giugni v. U. S., 127 F. (2d) 786	109, 110
Goesaert v. Cleary, 335 U.S. 464	43
Gray v. U. S., 9 F. (2d) 337	142
Harris v. Mun. Court, 209 Cal. 55	50
Harris v. So. Carolina, 338 U.S. 68	222
Hartzell v. U. S., 72 F. (2d) 569	142
Hawley v. U. S., 133 F. (2d) 966	90
Healy v. Wellesley & B. St. Ry. Co., 176 Mass. 440, 57 N.E. 703	220
Hicks v. Hiatt, 64 F.S. 238	202, 205, 208
Hirabayashi v. U. S., 320 U.S. 81.....	83
Holloway v. U. S., 148 F. (2d) 665.....	56
Hopt v. Utah, 110 U.S. 574	142
Hunter v. U. S., 62 F. (2d) 217	114
Inglis v. Sailors Snug Harbor, 28 U.S. 99.....	39
In re Alpine, 203 Cal. 731	50
In re Bergerow, 133 Cal. 349	50
In re Johnson, 167 U.S. 120	63
In re Yamashita, 327 U.S. 1	123
Ishikawa v. Acheson, 85 F.S. 1	83
Johnson v. Eisentrager, 94 L. Ed. Adv. Ops. 814.....	
.....58, 74, App. 10, 116, 123, 124	
Johnson v. U. S., 318 U.S. 189	119
Juando v. Taylor, Fed. Cas. No. 7558	39
Kansas City So. Ry. v. Road Impr. Dist., 256 U.S. 658.....	43
Kasinowitz v. U. S., 181 F. (2d) 632.....	88, 115, 117
Kawakita v. U.S., No. 12061	102, 124

	Pages
Keefe v. State, 50 Ariz. 293, 72 P. (2d) 425.....	233
Kelley v. Andrews, 71 N.W. 251	171
Ker v. Illinois, 119 U.S. 436	64
Korematsu v. U. S., 323 U.S. 214	83
Lee v. Mississippi, 332 U.S. 742	130
Lisenba v. California, 314 U.S. 219	119
Litkofsky v. U. S., 9 F. (2d) 877.....	142
Little v. U. S., 73 F. (2d) 861	84, 218
Little York G. W. & W. Co. v. Keyes, 96 U.S. 199.....	57, 58
Lombard v. Mayberry, 24 Neb. 674, 40 N.W. 271.....	167
Lustig v. U.S., 338 U.S. 74.....	144
Mahon v. Justice, 127 U.S. 700	61, 62, 64
Mangum v. U. S., 289 F. 213	142
Martin v. Canal Zone, 81 F. (2d) 913	114
Masonic Cemetery v. Gamage, 38 F. (2d) 950.....	46
Maxwell v. Habel, 92 Ill. App. 510.....	217
McCool v. U. S., 263 F. 55	56
McDowell v. U. S., 74 F. 403	154
McGrath v. Abo, Nos. 12251-2	40
McMahon v. Hunter, 150 F. (2d) 498	65
McNabb v. U. S., 318 U.S. 332.....	60, 61, 62, 66, 67, 72, 138, 139, 140, 147, 152
Meeks v. U. S., 163 F. (2d) 598	218
Miller v. The Resolution, 2 U.S. 1	107
Minker v. U.S., 85 F. (2d) 425	137
Minner v. U. S., 57 F. (2d) 506	114
Mooney v. Holohan, 294 U.S. 103	53
Morei v. U. S., 127 F. (2d) 827	56
Morrow v. U. S., 11 F. (2d) 256	241
O'Shaughnessy v. U. S., 17 F. (2d) 225.....	114
Overland Constr. Co. v. Snyder, 70 F. (2d) 338.....	233
Parlton v. U. S., 75 F. (2d) 772	218
Patterson v. U. S., 222 F. 599	188
People v. Buster, 53 Cal. 612	134
People v. Jones, 24 Cal. (2d) 601, 150 P. (2d) 801.....	151
People v. Keel, 91 Cal. App. 599	131
People v. Sanchez, 35 A.C. 565, 219 P. (2d) 9.....	137
People v. Sarrazawski, 27 Cal. (2d) 7, 161 P. (2d) 934...	218

	Pages
People v. Stevenson, 103 Cal. App. 82, 284 P. 487....	218, App. 82
People v. Strong, 30 Cal. 151	134
Pettibone v. Nichols, 203 U.S. 192	61, 62, 63
Pierce v. U. S., 86 F. (2d) 949	137
Prevost v. U. S., 149 F. (2d) 747	181
Reavis v. U. S., 93 F. (2d) 307	56
Reilly v. Pinkus, 94 L. Ed. Adv. Ops. 79	220
Respublica v. McCarty, 2 U.S. 86	108, 109, 115
Rex v. Vine St. Police Station (1916), 1 K.B. 268.....	124
San Antonio Transit Co. v. McCurry, 212 S.W. (2d) 645..	213, 214
Sarkisian v. U. S., 3 F. (2d) 599	90
Sawyer v. U. S., 27 F. (2d) 569	231
Schwartz v. U. S., 160 F. (2d) 718	119
Scripps-Howard Radio v. F.C.C., 316 U.S. 4.....	71
Shanks v. Dupont, 28 U.S. 242	39
Shannon v. U. S., 76 F. (2d) 490	88, 108, 113
Sheehan v. Huff, 142 F. (2d) 81	67
Sims v. Rives, 84 F. (2d) 871	42
Smith v. U. S., 173 F. (2d) 181	119
Spitzer v. Meyer, 198 Ill. App. 550	217
Stamphill v. Johnson, 136 F. (2d) 291	67
Standard Acc. Ins. Co. v. Heatfield, 141 F. (2d) 648.....	233
State v. Bradley, 134 Conn. 102, 55 Atl. (2d) 114	154
State v. Crowder, 119 Wash. 450, 205 P. 850	167, App. 47
State v. Hall, 20 Mo. App. 397	167
State v. Harris, 64 S.W. (2d) 256	220
State v. Irwin, 17 S. Dak. 380, 97 N.W. 7.....	217
State v. Schleifer, 102 Conn. 708, 130 Atl. 184.....	154
State v. Truskett, 85 Kan. 804, 118 Pac. 1047.....	134
Steffen v. S.W. Bell Tel. Co., 56 S.W. (2d) 47.....	220
Sunderland v. U. S., 19 F. (2d) 202	223, 224
Swafford v. U. S., 25 F. (2d) 581	231
Takeguma v. U. S., 156 F. (2d) 437	83
Talbot v. Johnson, 3 U.S. 133	38
Taliaferro v. U. S., 47 F. (2d) 699.....	137, 198
Tanksley v. U. S., 145 F. (2d) 58	227
Temple v. Duran, 121 S.W. 253	154
The Silver Palm, 94 F. (2d) 754	202

	Pages
Thomas v. D. C., 90 F. (2d) 424	217
Thomas v. U. S., 151 F. (2d) 183	188
Tucker v. U. S., 5 F. (2d) 818	166
Turk v. U. S., 20 F. (2d) 129	197
Turner v. Pennsylvania, 338 U.S. 62	222
Upshaw v. U. S., 335 U.S. 410	
.....60, 61, 66, 67, 138, 139, 140, 141, 146, 152	
U. S. v. Andolscheck, 142 F. (2d) 503	229
U. S. v. Beekman, 155 F. (2d) 580.....	229
U. S. v. Bowman, 260 U.S. 94	68, 69
U. S. v. Brotherhood of Carpenters, 330 U.S. 395.....	84
U. S. v. C.I.O., 335 U.S. 106	229
U. S. v. Cooper, Fed. Cas. No. 14864	151
U. S. v. Flint, Fed. Cas. No. 15121	213
U. S. v. Gillies, Fed. Cas. No. 15206	39
U. S. v. Greiner, Fed. Cas. No. 15262	108, App. 18
U. S. v. Haupt, 136 F. (2d) 661	139, 140
U. S. v. Hudson, 11 U.S. 32	57
U. S. v. Johnson, 323 U.S. 273	58, 67, 72
U. S. v. Kobli, 172 F. 919	227
U. S. v. Krulewitch, 145 F. (2d) 76	230
U. S. v. Kuwabara, 56 F.S. 716	83
U. S. v. Marcus, 166 F. (2d) 497	56
U. S. v. McWilliams, 163 F. (2d) 695	52
U. S. v. Miller, 307 U.S. 174	47
U. S. v. Mitchell, 271 U.S. 9	120
U. S. v. Mitchell, 322 U.S. 65	61
U. S. v. Nettl, 121 F. (2d) 927	137
U. S. v. Palese, 133 F. (2d) 600	23
U. S. v. Ragen, 180 F. (2d) 321	229
U. S. v. Throckmorton, 98 U.S. 61	213
U. S. v. Unverzagt, 299 F. 1015	66
U. S. v. Vigol, 2 U.S. 346	108
U. S. v. Yount, 267 F. 861	43
U. S. ex rel. Schleuter v. Watkins, 67 F.S. 556	229
U. S. ex rel. Schleuter v. Watkins, 158 F. (2d) 853.....	229
U. S. ex rel. Voight v. Toombs, 67 F. (2d) 744	65
Van Beek v. Sabine Towing Co., 300 U.S. 342.....	127, App. 18

	Pages
W. L. Fain Grain Co. v. U. S., 68 Ct. Cl. 441.....	202
Watts v. Indiana, 338 U.S. 49	222
Weare v. U. S., 1 F. (2d) 617	187
Webster v. Fall, 266 U.S. 507	120
Weeks v. U. S., 232 U.S. 383	60
Weightman v. Corp. of Washington, 66 U.S. 39.....	133
Weiler v. U. S., 323 U.S. 606	84
Wesley v. State, 37 Miss. 327, 75 Am. Dec. 62.....	133
Whitney v. Zerbst, 62 F. (2d) 970	66
William C. Barry Inc. v. Baker, 82 F. (2d) 79.....	233
Williams v. State, 17 S.W. (2d) 56	154
Williams v. U.S., 93 F. (2d) 685	114
Wilson v. U. S., 162 U.S. 613	142, 193
Wilson v. U. S., 4 F. (2d) 888	153, 167
Yu Cong Eng v. Trinidad, 271 U.S. 500	42

Statutes

Geneva Convention, 47 U.S. Stats. at L. 2021.....	36, 121, 122, 123, 124, 126, 127, 128, 129
Rule Crim. Proc. 18	65
Rule Crim. Proc. 26	90
5 U.S.C. 22	228, 229
8 U.S.C. 101 ff	40
8 U.S.C. 801 (i)	40, 46
10 U.S.C. 15	36, 58, 59, 60, 62, 67, 68, 69, 70, 71, 72
10 U.S.C. 1542	139
18 U.S.C. 1	1, 42, 43, 45, 46, 68, 70, 126, 127
18 U.S.C. 582	48
18 U.S.C. 2381	42
18 U.S.C. 3005	185, 186
18 U.S.C. 3183	70
18 U.S.C. 3193	69
18 U.S.C. 3238	57, 58, 65, 66, 67, 71

	Pages
18 U.S.C. 3282	48
18 U.S.C. ch. 211	65
28 U.S.C. 1291	2
28 U.S.C. 1294 (1)	2
28 U.S.C. 1733 b	181
50 U.S.C. 21 ff	125
50 U.S.C. ch. 3 A Section 24 (3) (a) (b)	47
U. S. Constitution:	
Amendment V	36, 42, 43, 54
Amendment VI	35, 50, 52, 54, 184, 185, 186, 227
Article III, Section 3	42, 44, 46, 48, 49
Article VI, cl. 2	122, 128
15 U. S. Stats. at L. 223	39
31 U. S. Stats. at L. 330	62
34 U. S. Stats. at L. 1228, Act of Mar. 7, 1907.....	39
54 U. S. Stats. at L. 1137, Act Oct. 4, 1940	40

Texts

53 Am. Jur. 478	133
64 C. J. 123	217
70 C. J. 464	171
38 Cyc. 1330	217
7 Cyclopedia Fed. Proc. (2d Ed.), Section 3375.....	133
East's Pleas of the Crown (1806)	106, App. 16, 110, 111, 116
Foster's Crown Cases (1776)	105, App. 15, 111
Hale's Pleas of the Crown (1778)	105
1 Hawkins' Pleas of the Crown (1795)	106
Kelyng's Crown Cases	105
2 Kent's Commentaries Lect. XXV	38
2 Moore on Facts	212, 213
2 Wharton's Criminal Evidence (11th Ed.), Section 601..	151

	Pages
2 Wigmore on Evidence (3d ed.), Section 278..205, App. 80, 208	
3 Wigmore on Evidence (3d ed.) :	
Section 690	208
Section 860	142
Section 861	193
Section 884	208
Section 940	223
Section 950	223
Section 1040	219
5 Wigmore on Evidence (3d ed.), Section 1615	231
6 Wigmore on Evidence (3d ed.), Section 1745	233
8 Wigmore on Evidence (3d ed.) :	
Section 2340	170
Section 2378 a	230



No. 12,383

IN THE
United States Court of Appeals
For the Ninth Circuit

IVA IKUKO TOGURI d'AQUINO,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

BRIEF FOR APPELLANT.

The appellant was defendant in the United States District Court for the Northern District of California, Southern Division, on a charge of treason. (18 U.S.C. 1.)

Parts of the proceedings in the case have been printed and parts brought up to this Court typewritten. Each has an independent page numbering, beginning at page 1. We shall designate the pages of the printed parts as "R. 1" etc. Since there are 54 typewritten volumes, references thereto will be both by the Roman numeral of the volume followed by the page and line—e.g., I-1:1. The two volumes of argument, again have their own page numbering, and will be designated as I Arg. and II Arg. The clerk's transcript, motions before and after trial, and the contents of depositions read by defendant are printed;

the testimony of witnesses given in Court and the arguments are typewritten. Exhibits have been brought up as originals, or by photostats.

The indictment was returned October 8, 1948. (R. 7.) It rested partly on perjured evidence. (See *infra*, p. 207-8.) It charged defendant, as an American citizen, with adhering to the enemy, giving aid and comfort by preparing scripts and broadcasting over the Japanese radio during the period November 1, 1943-August 13, 1945. (R. 2, 3.) Eight overt acts were charged. (R. 2, 5-6.) The jury returned special findings, finding the defendant guilty on Overt Act No. 6, and not guilty on all the others. (R. 258-60.) The district judge sentenced defendant to ten years in prison and a \$10,000 fine. (R. 327.)

JURISDICTION.

For reasons to be stated hereafter, defendant denies that the District Court of the Northern District of California, Southern Division, or any United States District Court, had jurisdiction either to try her or to sentence her.

The United States Court of Appeals for the Ninth Circuit has jurisdiction over the appeal under 28 U.S.C. 1291, 1294(1).

DETAILED STATEMENT OF FACTS.

In conformity to the rules governing evidence on appeal, we take our facts first from the prosecution's evidence. The defendant's evidence we use only where it is uncon-

tradicted and unimpeached, or where conflicts serve to highlight the probably prejudicial effect of errors. Names of *Government witnesses* will be *italicized*.

1. DEFENDANT'S PERSONAL HISTORY.

The defendant, Iva Ikuko d'Aquino (nee Toguri), was born in Los Angeles, California, on July 4, 1916. (Govt. Exh. 3—birth certificate—I-58.) She was of Japanese lineage: Govt. Exh. 3, also photographs on passport applications, and otherwise. (Govt. Exh. 4, 5; I-71, 76; Govt. Exh. 73, XLVII-5294; Def. Exh. SS, XLIV-4919; Def. Exh. BP, L-5522.) Her father and mother, both lawful residents of the United States, were born in Japan. (Govt. Exh. 4, 5; Def. Exh. BP,). She was educated in California public schools, and graduated from the University of California at Los Angeles. (Def., XLIV-4912:15-4914:1.) The prosecution introduced evidence that in 1941 while she was attending the university she had talked about studying medicine in Japan. (*Steggall*, XXII-2344-5.) She denied any conversation or intention referring particularly to this, stating that there was only general talk about different countries to which the students might like to go for further study. (Def. XLVII-5258-60, especially 5260:18-21.)

She resided in this country until July 5, 1941, when she sailed for Japan (Def. XLIV-4912:13-14) as a family representative, in lieu of her bed-ridden mother, to visit her maternal aunt who was reported to be on the verge of death. (Def. XLIV-4917:14-24.) Her father applied to the State Department for a passport to enable her to make

the trip. (Def. XLIV-4918.) However, she never at any time received a passport. Because the matter was urgent she then presented an application to the U. S. Immigration and Naturalization Service at Los Angeles for a certificate in lieu of a passport to enable her to make the trip. She received from that office a "Certificate of Identification". (Def. XLIV-4918:8-17; Exh. SS, XLIV-4919 is the certificate.) This enabled her to sail on the Arabia Maru for Japan where she arrived on July 24, 1941. (Def. XLIV-4920.)

On arrival at Yokohama she applied for and received a resident permit which was valid for a six months period. (Def. XLIV-4921.) She had only \$300 in her possession and this was intended to be reserved for her return passage. (Def. XLIV-4921.)

Shortly after her arrival she filed a written verified application for a U. S. passport in the office of the U. S. Consulate in Tokyo in August, 1941. (Def. XLIV-4922:9-14.) No such passport was ever issued to her. (See Def. TT, XLIV-4923, letter to defendant from the U. S. Consul at Tokyo, December 1, 1941, the last communication to her from the State Department before the war.)

On the afternoon of December 1, 1941, she received a cablegram from her father instructing her to board the Tatsuta Maru which was scheduled to sail for the United States on December 2nd. (Def. XLIV-4926-7.) She applied immediately to the NYK Line for passage and was informed that she had to have a passport or identification from the U. S. Consulate and a letter from the school she had attended showing she had not been employed in Japan before she could book passage. (Def. XLIV-4927.)

She obtained and presented an identification document and a letter from the school principal to the NYK Line and was informed that she had then to get clearance from the Finance Ministry. She applied for that clearance but it was refused. (Def. XLIV-4928-9.) As a result she was stranded in a hostile Japan, was ignorant of its language and without an income from any source.

On September 13, 1916, when she was two months nine days of age she was registered in the koseki of her father's ancestral line in Japan. On January 13, 1932, her father had that registration cancelled. (Def. XLIX-5500.) By reason of her own choice and her father's apparent aversion to Japanese the defendant had been reared to associate with Caucasians among whom they lived rather than with persons of Japanese descent. Her parents spoke English. (4916.) She was not compelled to study the Japanese language during her formative years. In consequence, she was unable to speak, read or understand the Japanese language when she arrived in Japan. (Def. XLIV-4914-5.) Thereafter she acquired a very limited knowledge of the language by attending a Japanese language school in Japan for a short time before and after December 7, 1941. (Matsumiya, R. 795-7; Def. XLIV-4930:13-4931:2.)

Learning from an article in English in the Mainichi, an Osaka newspaper published in English, that the Swiss Legation would accept applications for the evacuation of strandeers from Japan she applied in February, 1942, for evacuation on the first of such evacuation ships. (Govt. Exh. 7, 1-80; Def. XLIV-4935-4937.) To be eligible for passage she asked the second secretary of the Legation to verify her U. S. citizenship by cabling Washington and

asking for an answer. The answer from our State Department was a denial of her U. S. citizenship, its declaration being that her "citizenship was in doubt". (Def. XLIV-4937:21-23.) As the result she was refused passage.

She boarded and lodged at her uncle's house for 50 yen per month until June, 1942 (Def. XLIV-4940; 4941; 4951; XLV-4956-7), when her funds ran out. Harassed by police and kempeitai visits concerning the defendant and the insistence of neighbors her uncle asked her to leave his home. (Def. XLV-4957.) Thereafter, she lodged and boarded where she could and was hard put to earn sufficient money to pay her way. (Def. XLIV-4951-3; XLV-4956-7; 4965.) Because she was destitute, friendless, an alien enemy to Japan in a hostile Japan, under constant police and kempeitai surveillance and suspicion, unfamiliar with the Japanese language and forced out of her uncle's home she had to obtain employment to keep body and soul alive. Because she was acquainted only with English she was able to obtain only part time employment. She became a typist at Matsumiya's school for a pittance of 20 yen per month and gave piano lessons to his children for 2½ yen per month, this income being applied on her tuition. (Def. XLIV-4946-7; 4941.)

She faced starvation from June, 1942, to September, 1942, because the Japanese authorities *denied her a ration card* as a means of pressure upon her to become a Japanese citizen. (Def. XLV-4960.) Faced with starvation for want of employment, denied her because she was an American citizen and lacking knowledge of the Japanese language, she walked the streets for about three months in an effort to get a job (Def. XLV-4968) to keep body and soul together. She obtained work as a typist-monitor for

the Domei News Agency in June, 1942, where she remained until December, 1943. (Def. XLIV-4942-44.) Domei was a source from which she obtained shortwave news from the United States which she relayed to Allied POW's at Radio Tokyo and Bunka Prison to bolster up their morale. She started this work at 110 yen per month less a 25 per cent tax. (Def. XLIV-4947-8.)

Thereafter, in September, 1942, she received a notice from the Swiss Legation announcing the prospective sailing of a second evacuation ship. (Def. XLIV-4938.) She went to the Legation to ascertain the possibility of boarding that ship and applied for passage to the United States. (Def. XLIV-4939.) She was informed that she needed \$425 as fare. (Def. XLIV-4939.) Her funds then were exhausted. She had "not one dollar" to her name and, in consequence, she later canceled that application for want of passage money. (Def. XLIV-4939-4941 and Govt. Exh. 7, I-80, and Ito, XL-4541.) At this time her family were detained in an American concentration camp at Gila River, euphemistically termed a War Relocation Center. She couldn't get in touch with them and didn't know where to communicate with them to learn whether they could pay her fare. (Def. XLIV-4939-4942.) (Attention is directed to the fact that her parents were barred under the provisions of the Trading With the Enemy Act from advancing any such fare and that, by reason of their detention and their consequent loss of their own resources and control over the same, they would have been prevented from paying her fare had they otherwise been authorized so to do.) Her mother died in one of those Centers. (Def. XLIV- 4910.) Chiyeko Ito, a witness who had been sub-

poenaed by both sides but who was called by the defense, testified to a supposed conversation in which she and the defendant expressed the belief of themselves being put into an internment camp if they returned to the United States. (Ito, XL-4538:5-9; 4541:3-4542:1.) The defendant testified that the only factors which induced her to cancel the application were her utter lack of funds and consequent inability to obtain the fare. (Def. XLIV, 4939-4941.) The cutting of communication between Japan and the United States (Def. XLIV-4942) was an additional factor which prevented her from communicating with her family had she been able to learn where they had been incarcerated.

The question is probably academic because a United States Consular memorandum dated April 4, 1942, is in evidence reciting that the American authorities considered defendant's citizenship "not proved" and that they intended to do nothing for her during the continuance of the war. (Def. Ex. A, II-116.) Because she was trapped in Japan by the onset of war and the United States authorities would not lift a hand for her to return to the United States she would have had to remain isolated in hostile Japan for the duration of the war even if she had not cancelled her last application for evacuation.

In June, 1943, she was suffering from malnutrition, was afflicted with beri-beri, sinus infection and otitis media and was given hospital treatment by Dr. K. W. Amano. (Amano, R. 818-9; Def. XLV-4969.) He found her attitude and allegiance during the war to be "entirely definitely American" and testified that she mentioned that "the Japanese would be defeated". (Amano, R. 819.)

To save herself from trouble arising out of disputes with the employees of Domei in whose presence she made pro-American statements she resigned the Domei job in the latter part of 1943. (Def. XLV-4973-4975; d'Aquino XLIII-4749-4752.)

In debt for borrowings necessitated to enable her to live she asked Kuroishi if he knew of any part time jobs open for a person who could not speak or write Japanese. Learning from an ad in the Nippon Times, published in English, that Radio Tokyo would conduct tests for typist jobs in English she applied to Radio Tokyo, took the competitive examination and in August 23, 1943, became a part time typist in the business office of Radio Tokyo. (Def. XLV-4969-71; Cousens XXVIII-3157:8-14.) (Kuroishi said he interceded with Radio Tokyo to help her get this job. *Kuroishi*, XXI-2284:5-7; 2285:18-21.) The head of this business office was Shigechika Takano. (Def. XLV-4972.) She started this work at 100 yen per month less 25-26% tax deductions so she received a net of 78-80 yen which was reduced to 64-65 yen. (Def. XLV-4972.) The salary was raised to 180 yen less deductions (Def. XLIX-5405-6), which yielded her a net of only 130 yen. (Def. XLIX-5516, and Exh. 13, II-208.) After she had this typing job events took a turn which eventually brought her into the toils of the present prosecution.

In January, 1944, in response to an ad in the Nippon Times, a newspaper published in English, she applied to the Danish Minister, the Hon. Lars Tillitse, for a typist job in the Danish Legation in Tokyo and was employed there from January 6, 1944, until that Legation was closed out when Denmark severed diplomatic relations

with Japan in May, 1945. (Tillitse, R. 807; Def. XLIV-4948-4950.) While there employed she obtained news she relayed to the Allied POW's and delivered food, medicine and tobacco to them. (Def. XLV-5044-6; 5048; 5055-6.) Her salary started at 150 yen and later was raised to 160 yen per month. (Tillitse, R. 807.) In the summer of 1943, the Japanese had three captive Allied war prisoners at Radio Tokyo whom they had ordered to broadcast. (*Tsuneishi*, head of the Japanese military broadcasting system, admitted the orders, but denied that he personally threatened them with death (V-359-60; V-323-4; VII-460) for disobedience. The three prisoners testified that they were threatened with death. Major Charles E. Cousens (Australian), XXVIII-3122:9-18, 3179:22-25, 3180:23-3181:3; XXIX-3235:21-3236:8; Captain Wallace E. Ince (American), XXXI-3463:6-11; 3521:9-3522:8; Lt. Norman Reyes (Filipino), XXXII-3579:3-8; 3598:18-19; 3665:18-21.) Their program had been expanded once and in November, 1943, was scheduled to be expanded again, so as to include a woman's voice. (See *infra*.) Since March, 1943, Reyes had been broadcasting a 20 minute program of music, beamed to the American troops, and called the "Zero Hour". (*Mitsushio*, XI-1052:17-20, 1054:1-10, 1055:24-1056:5, 1061:12-16.)

In August of the same year (1943) this was expanded into a 60-minute program, including prisoner-of-war messages, music and news commentaries. (*Mitsushio*, XI-1061:17-21, 1062:5-11, 1073:13-1074:1, 1086:7-14, 1087:20-1088:2.)

From August 23, 1943, to November 10, 1943, the defendant was employed as a part time typist in the business office of Radio Tokyo. She was under the supervision of

Shigechika Takano, the head of that department. On August 24, 1943, she saw the prisoners of war, Cousens, and Ince, and Reyes, brought into the office where she was talking to Ruth Hayakawa. (XLV-4976-7.) The defendant expressed sympathy for them (XLV-4978) and the next day Miss Hayakawa introduced her to Cousens and Ince. Thereafter she talked to them whenever the opportunity arose. Cousens related the history of their capture and how they came to be in Radio Tokyo. (Def. XLV-4979-4982; Cousens, XXVIII-3164, re informing her that the Japanese were uncivilized and "you did what you were told or you died" (3165) and reciting eye witness account of the torture and murder of an Australian POW by the Japanese (3167) at Singapore.) She started to relay short-wave news to them of Allied successes, took them periodicals and started to deliver food to them.

In November, 1943, the Japanese General Staff decided to expand the "Zero Hour" still further by putting a female voice on it. (*Mitsushio*, XI-1089:4-8.) *Hereupon Major Cousens, the Australian prisoner of war, talked the Japanese authorities into putting the defendant on the Zero Hour.* (*Mitsushio*, XI-1091:16-21; XII-1099:8-1100:6; Cousens, XXVIII-3182:12-3183:14.) Mitsushio, the civilian head of the Zero Hour (*Tsuneishi*, IV-278:8-13), took the matter up with his superior, Takano (*Mitsushio*, XI-1092:7-16), who was head of the Japanese overseas broadcasting bureau. Takano informed Mitsushio that he was loaning the defendant to the broadcasting department. (*Mitsushio*, XII-1096:5-17.)

On November 10 or 11, 1943, while she was typing in the business office George Nakamoto, alias Mitsushio,

entered that office and told her that "army orders had come through" that she "was to be taken down to be put on a new entertainment program put on by the prisoners of war, that "it was by the prisoners of war who was putting on this entertainment program", that she "had been chosen and subsequently ordered by the army" and that she would be taken down for a voice test. (Def. XLV-4983-4.) She protested and he said (Def. XLV-4983:24-4984:1.)

"It is not what you want. Army orders came through and army orders are army orders. If you want details, go see your boss".

Thereafter, she went to see Takano who said to her (Def. XLV-4985:4-7; 12-13, 16-17; 19-21):

"I meant to tell you when you first came in that we had received army orders that you had been selected by the prisoners of war to be put on this new entertainment program."

"As far as he knew, he was my direct boss, that army orders had ordered me down for the voice test * * * and you took this job as an alien with Radio Tokyo, didn't you?"

"You have no choice. You are living in a militaristic country. You take army orders. You know what the consequences are. I don't have to tell you that."

Thereafter, she was taken down to Major Cousens for a voice test. She told him Takano had told her that "army orders had been sent down" and that she "was ordered to take a voice test for this new prisoner of war program". (Def. XLV-4990; Cousens XXVIII-3184.) She

protested to him (Cousens XXVIII-3184-5) but he said (Def. XLV-4987:1; 4987:21-4988:4):

“Don’t worry about that. We chose you for a specific reason.”

Cousens also stated to her that the program was “completely entertainment”. (Def. XLV-4999; Cousens XXVIII-3187). His purpose was to burlesque the program. (Cousens XXVIII-3188.)

Three days later she asked Cousens why she had been ordered on the program. He stated that he had selected her after discussion with the other prisoners because he felt they could trust her. (Def. XLV-4992.) She learned the prisoners were under threat of being executed if they disobeyed Japanese army orders. (Def. XLV-4994).

From the time she first was forced to appear on the Zero Hour program and constantly thereafter Cousens reminded the defendant that she was “never to disobey the Japanese army militarists, because they were brutal and sly and cunning”. He later told her “never say anything against the Japanese army officers or army orders” as POW’s at Bunka had been taken away for refusal to obey army orders and Kalbfleish had been taken away to be executed for disobedience. (Def. XLVI-5079.) She also learned that Capt. Ince had been scheduled for execution for disobedience to army orders and that Cousens had intervened and saved his life. (Def. XLVI-5080.) Huga also informed her of the consequence of disobedience to such orders and she feared like consequences. (Def. XLVI-5080.)

“You have been selected by the prisoners of war for a specific reason.”

“Don’t let the fact that you do not know what kind of a voice you have or whether you have any radio experience or not have anything to hamper you in any way. I am going to write all the scripts. I have complete control of the program. Can you state here that you will become one of our men—one of our men—one of the soldiers to fight from this end of the line?”

That testimony was fully corroborated by Cousens. (Cousens XXVIII-3186-7.)

He also told her that by virtue of this program they would be able to put on, send over prisoner of war messages to the families of the prisoners of war and he said (Def. XLV-4988:14-17):

“Place yourself in my command—place yourself in my hands, and just do exactly as I tell you. That is all I am going to tell you to do.”

Throughout the war from February, 1942, the defendant repeatedly told Chiyeko Ito that she didn’t like Japan and its people, that she hated the Japanese militarists, that she always referred to the Japanese people as “Japs” and “stupid”, that she was going to keep her U. S. citizenship “no matter what happens” and that she always told her to keep her U. S. citizenship. (Ito, XL-4506-4513.) She expressed similar views to Miss Ito on a number of occasions during 1942-1945, stating that “she would never take out” Japanese citizenship, that the U. S. would win the war, and that, despite the pressure brought upon her by the police and neighbors she would keep her American citizenship. (Ito, XL-4513-4518.) The defendant several times told her that she “would never buy” any Japanese war bonds. (Ito, XL-4520; Def. XLVI-5101.)

During the same period the defendant told Yoneko Kanzaki, nee Matsunaga (who had been conscripted by the Japanese, Kanzaki, XLI-4572; 1-6), that she had been investigated by the police and the kempeitai, that she didn't like Japan, its ways, customs and the people, that she would never give up her American citizenship and become a Japanese, that Japan didn't have a chance in the war, that she had refused to change her citizenship despite pressure of the kempeitai. (Kanzaki, XLI-4566-4570.) Mrs. Kanzaki also testified that she received instructions at Radio Tokyo that she was not to associate with the personnel of the Zero Hour "because they were enemies of Japan". (XLI-4578.) She also testified that the defendant did not associate with Japanese nationals at Radio Tokyo, limiting her associations to the POW's. (XLI-4581.)

She continually refused to buy Japanese war bonds. (Kido, R. 837; Ito, XL-4520; Okada, R. 779; Def. XLVI-5101; 5142-4; d'Aquino XLIV-4843-4.) She refused to contribute metal ware, old clothes or cotton to help the Japanese war effort. (Kido, R. 837; Def. XLVI-5143-4.) Instead she bartered her old clothes for food, medicine and tobacco which she delivered to the POW's at Bunka who were starving. (Def. XLV-5047.) She refused to contribute to the Japanese Red Cross. (Def. XLVI-5143.) She refused to bow toward the Emperor's palace. (Def. XLVI-5144.) She refused to celebrate any Japanese national holidays. (Def. XLVI-5144.) So far as possible she did not associate with Japanese nationals but was friendly to the POW's. (Kanzaki, XLI-4581; Hayakawa, R. 388; d'Aquino, XLIII-4787; XLIV-4893; Ozasa, R. 439.) Whenever she mentioned the Japanese she referred

to them contemptuously as "Japs". (d'Aquino, XLIII-4785-6; Ito, XLV-4513; Ince XXXI-3512.) Her neighbors referred to her as an American spy. (d'Aquino, XLIII-4789.)

Those repeated expressions and acts of loyalty to the United States and of opposition to Japan made by the defendant while in the heart of the enemy country when she was surrounded by a hostile people, in conjunction with her continuous secret aid to the Allied POW's which she rendered at the risk of her own life completely negative any suggestion of criminal intent upon her part. It certainly is not a rule of law to expect a little girl to conform to the same standards of courage as might be expected of a male in like circumstances. It was an extraordinary exhibition of courage for the little typist-announcer defendant to run that risk when it was not even to be expected of a soldier.

2. DEFENDANT'S CITIZENSHIP.

Defendant always refused to take out Japanese citizenship, though in wartime Japan great and continuous pressure was put on her to do so. (The fact that defendant did *not* take out Japanese citizenship is part of the government's case against her. See *infra*. Also see Def. Ex. BP, L-5522, certificates of Minister of Home Affairs, *Nakamura*, XXII-2321:1-8, Defendant, XLIV-4934:2-13, XLV-4958:19-24; Kanzaki, XLI-4566:13-4569:23; Ito, XL-4508:22-4511:20; Cousens, XXVIII-3160:16-19.) The *United States Government* rewarded this steadfastness by *denying her claims of American citizenship on all oc-*

casions except when it wanted to prosecute her for treason. At the outbreak of the war the government repudiated her citizenship rights by denying her a passport and making an entry that her citizenship was not proven (Def. Ex. A, II-116; see also Philip d'Aquino, XLIII-4830:5-16; Def. XLVI-5171:20-5172:4) although exactly the same material then was before them which the Government later used at the trial below to "prove" her citizenship. (See Defendant's birth certificate and her own claims to U. S. citizenship. See Gov. Ex. 4, I-70, passport application of 1941, which recites that defendant had brought her birth certificate with her to Japan.)

Afterwards the American authorities informed her first that she was stateless, and second, that she was Japanese. (See Def. XLVII-5215:12-15, 5270:14-16; L-5526:17-25—stateless; Def. XLVII-5229:1-6, L-5524:9-12—Japanese.) Only when the United States arrested defendant on "suspicion of treason" in 1945 (Def. Exh. P, XVI-1603) and for purposes of the present prosecution did the government claim or even admit that the defendant had a claim to American citizenship.

On April 19, 1945, the defendant married Philip d'Aquino, a Portuguese citizen, who was of three-fourths Japanese and one-fourth Portuguese blood. (Pinto, R. 728-9; Philip d'Aquino, XLIII-4733:4, 4734:6-10, 4759:20; Defendant, XLV-5070:7-8.)

There is considerable testimony in the record as to defendant's acquiring Portuguese citizenship through the marriage to her husband on April 19, 1945. For the most part this appeal is not concerned with that issue, since the jury found in defendant's favor on overt acts 7 and 8,

the only ones alleged to have occurred after the date of the marriage. The matter of her marriage and citizenship is touched, however, in the instances where the prosecutor's misconduct in dealing with it is of such a nature as to affect the entire case.

3. JAPANESE PLAN IN BROADCASTING TO ALLIED TROOPS.

Major Shigetsugu *Tsuneishi* was the head of the Japanese military broadcasting system during the war. He was a witness for the prosecution. On direct and redirect he testified that the Japanese purpose in broadcasting to the Allied troops was to weaken their will to fight (*Tsuneishi*, III-237:5-8, 238:13-4; IV-245:1-3; VII-462:9-463:1); on cross-examination he gave an entirely different story. He said that while the Japanese army was losing, it was extremely difficult to put on any propaganda program, for which reason propaganda was withheld until such time as the Japanese might be winning again or making a successful resistance. *In the meantime the Japanese high command itself limited the broadcasts to simple entertainment programs.* (*Tsuneishi*, V-321:1-19; see Appendix p. 1.) It is interesting that the programs even included burlesques upon the Japanese themselves! (*Mitsushio*, XII-1164:9-21.) As the war went, no opportunity to broadcast propaganda ever presented itself. (*Tsuneishi*, V-321:17-19.)

4. CONTENTS OF DEFENDANT'S BROADCASTS.

The government's evidence is self-contradictory as to the contents of the defendant's broadcasts. In general it falls into three parts: (1) extant scripts, (2) American records of monitored programs, (3) unaided recollection of persons who claim they heard the broadcasts. *There is a complete inconsistency between the extant scripts and recordings of programs on the one hand, and witnesses' recollections on the other.* All existing scripts and all transcriptions of anything said by defendant are completely innocuous. They contain no propaganda whatsoever. On the other hand, the unaided recollection of witnesses is mostly of alleged propaganda broadcasts, and all testimony of supposed propaganda broadcasts came from this unreliable source (including Overt Act 6, on which defendant was convicted).

Mitsushio testified that he explained the alleged propagandistic nature of the program to defendant. (*Mitsushio*, X-908:18-25.) Defendant denied this, saying she was aware of it only indirectly when Cousens said he was using the program for his own purpose rather than for any Japanese purpose. (Defendant, XLVII-5307:15-5308:3; XLV-4999:3-10; XLVI-5102:7-13; 5103:1-5104:13; XLVIII-5383:17-5386:22.)

The expanded Zero Hour program opened with the musical piece "Strike Up The Band" which was followed by the reading of prisoner of war messages. (Defendant, XLV-5000-1; Cousens, XXVIII-3191.)

Cousens had persuaded the Japanese authorities to allow POW messages to be broadcast. (Cousens, XXVIII-3192.) The purpose was to convey news to Allied troops

of the whereabouts of missing and captured men and to let the families and friends of the POW's learn of their survival and so bolster morale on the home front. (Cousens, XXVIII-3192.) Hundreds of POW messages were broadcast over the Zero Hour program. Cousens, XXVIII-3191; *Tsuneishi*, IV-303-306; Ince, XXXI-3477. These messages also were rebroadcast over other POW programs at Radio Tokyo and vice versa. (*Tsuneishi*, VI-397; Ince, XXXI-3499.)

This was followed by Cousens' introduction of the defendant's part through the statement "Here comes your music". Thereupon the defendant, performing the simple duties of a disc jockey, read the script introductions to the recorded musical pieces of a classical, martial, semi-classical and jazz nature. (Def. XLV-5002-5; Cousens, XXVIII-3189, 3194.) Cousens wrote all her script except for a few which were done by Ince. (Cousens, XXVIII-3198-3203; Govt. Exhs. 22, 23, 44; Def. Exh. R. Ince, XXXI-3479-3483.) Later Cousens referred to the defendant as "Ann", derived from his script showing where music was to be announced, and later referred to her in the script as "Orphan Ann" because he considered her as one of the members of similar persons away from home who were in the U. S. Task Force in the Pacific known as "Orphans of the Pacific". (Def. XLV-5009; Cousens, XXVIII-3195-6.)

Until the latter part of December, 1943, Cousens reiterated to her that the Zero Hour was simply an entertainment program for the Allied soldiers. He then told her that "George Nakamoto thinks he is getting a home-sicky program"—"they think they are using us, but we

are using them''—The program is being very good entertainment program and it is serving our purpose. If we can send as many prisoner of war messages as we can possibly squeeze in, I think we are doing O.K.'' He told her he "wanted to send these messages home to let the families know the whereabouts of the captured prisoners of war being held in Japan to help morale on the home front". (Def. XLIX-5507-8; Cousens, XXVIII-3192.) About Christmas, 1943, Cousens revealed to her that they were defeating the purpose for which the Japanese intended the program. (Cousens, XXIX-3215; 3218.)

a. SCRIPTS AND TRANSCRIPTIONS.

The extant *scripts* are *Government Exhibits 22* (XIII-1356), *23* (XIV-1465—a group of scripts), *44* (XXVI-2823), *74* (XLVIII-5354) and Defendant's Exhibit R (XXVIII-3199).

Exhibits 16-20 inclusive are recordings of the program made by the Portland, Oregon, monitoring station. (XVI-1627, 1638, 1646, 1691, 1694.) Exhibit 21 is a recording made by one of the monitors at the Silver Hill, Maryland, station, who recorded a Japanese broadcast for his own pastime. (XVII-1729.) Exhibit 25 contains a transcript of the material recorded on Exhibits 16-21 inclusive. (XVII-1819—Exhibit 25 also contains other matter, not properly in the record, which we discuss later.)

Exhibits 63 (LII-5852) and 75 (LII-5827) are transcripts taken by the monitoring station in Hawaii.

These thirteen exhibits constitute all the record evidence of the contents or alleged contents of defendant's broadcasts.

They show no propaganda whatever; instead they consist of introductions to music, done in the manner of a nightclub master of ceremonies.

In strange contrast is the testimony of persons who claimed to remember hearing snatches of the defendant's programs. The prosecution introduced a great deal of such evidence. Before outlining it, we must note the excuse which was offered for not introducing more scripts. (It was agreed in the course of the oral argument that defendant must have taken part in about 340 programs. See calculation of the U. S. Attorney, I Arg.-20:6-11.)

The prosecution had its Japanese witnesses testify that just before the surrender the *Japanese* destroyed all the scripts on which they could lay hands. (*Oki*, IX-664:11-665:1; *Mitsushio*, X-906:10-907:3.) Inasmuch as exhibits 22, 23, 44, 74 and R had all come from the defendant's possession, it was even insinuated in argument that they were not typical, but that defendant had gone out of her way to save specially favorable scripts. (II Arg. 322:2-23.) *This whole presentatiton was proved fraudulent by the Government's rebuttal witness, Frances Roth.* She testified (a) that Hawaii had monitored the Zero Hour over an extended period of time (*Roth*, LII-5847:13-23, 5861:24-5862:5), (b) that permanent monitor's files were kept (*Roth*, LII-5866:23-5867:1, 5886:22-5887:9), (c) copies were mailed to Government departments, clients of the Federal Communication Commission (*Roth*, LII-5883:17-5884:5), (d) that at least some of the monitored transcriptions were destroyed by the American authorities as a matter of routine. (*Roth*, LII-5849:7-9, 5855:20-21, 5866:9-12, 5867:2-4, 5870:17-5871:2.) This shows *first* that at

one time the Government had numerous transcriptions of the Zero Hour programs; *second, that the Government either still had these at the time of the trial and deliberately suppressed them or had previously destroyed them by way of routine, presumably as being innocuous.*

The Government's attempt to create the impression that it could not produce other scripts or transcriptions because all records had been destroyed *by the Japanese* was therefore an attempt to deceive the defendant, the Court and the jury.

Moreover, since the monitored transcriptions in Exhibits 16-21 and 25 are of the same nature as the scripts turned over by defendant (Exhibits 22, 23, 44, 74, R), it is evident that *all are representative*. This fact is especially significant in assessing the contradiction between the contents of the scripts and transcriptions on the one hand and the witnesses' unaided recollections on the other.

Further, we direct attention to the fact that it is the duty of the Government to product evidence which sheds light on an accusation whether it makes for or against a defendant. *U. S. v. Palese* (C.C.A.-3), 133 Fed.2d 600, 603, and cases there cited. The prosecution failed to perform this duty in the instant case to the serious detriment of the defendant. This resulted in a denial of due process and of a fair and impartial trial.

b. RECOLLECTION OF WITNESSES.

The witnesses who testified to their recollections fall into two groups: those who claimed to have overheard the defendant as she broadcast in Tokyo, and those who claimed to have recognized her voice as they listened to

the radio. The former testified to momentary snatches which they said they heard in passing; the latter to what they believed they had heard as they were listening to the radio for recreation, from a voice which they identified after listening to Government Exhibits 16-21.

Both groups claimed to have heard much the same things, none of which appear either in scripts or transcriptions: unfaithful wives and sweethearts, ice cream and steaks, American battle losses, jungle fever and mud. In addition, alleged broadcasts of troop movements were testified to only by soldiers who listened to the radio for recreation.

The witnesses who said they overheard bits of defendant's broadcasting at Radio Tokyo are further subdivided into two classes: those who say they saw her talking into the microphone, and those who claim they recognized her voice over the monitoring system.

(1) Witnesses who claim to have overheard defendant at Radio Tokyo.

They included *Oki* and *Mitsushio*, the two mainstays of the prosecution, plus the others listed below. We summarize what each said as to defendant's alleged broadcasts (excepting alleged overt acts on which the jury found in her favor):

Oki—IX-657ff.

Overt Act 6—October, 1944, referring to Battle of Leyte Gulf, "Now you fellows have lost all your ships. You really are orphans of the Pacific. Now how do you think you will ever get home?" (IX-672:16-18.)

Mitsushio—X-896ff.

Overt Act 6—"Now you have lost all your ships. You really are orphans of the Pacific. How do you think you will ever get home?" (XI-974:1-3.)

* * * * *

"Cold water sure tastes good"—allegedly after hearing news that an American contingent had landed on an island and were short of water. (X-919ff.)

On this one, the witness first said he was present in the broadcasting room (X-924:13-17); later that he heard defendant over the monitor (XII-1140:2-22) and still later that he was talking about two different occasions. (XIII-1322:5-12.)

Nakamura—XXI-2288ff.—"in the fall" of 1944—"Now you have lost so many ships, how are you going to find your way home. Or something to that effect". (XXI-2300:22-5; offered as Overt Act 6, XXI-2295:21-4.)

Moriyama — XXIV - 2542ff. — (dancing in Coconut Grove, "my but it is hot"—ice cream at corner drugstore).

This witness said he did not pay much attention to the program. (XXIV-2600:13-15.)

Sugiyama—XXIV-2501ff.—"You must be lonely out there. Let me cheer you up with some music." (XXIV-2506:16-18.) "It is very uncomfortable out there." (XXIV-2508:10.)

This witness was at least partly favorable to the defense. The deliberate distortion of his testimony in the prosecu-

tion's closing argument was duly assigned as misconduct and is one of the claims of prejudicial error.

Igarashi—XXIV-2602ff.—U. S. ship losses,—“stop fighting and enjoy life—in U. S. you listened to music with sweethearts, now listen.”

This witness was vigorously prompted by the prosecutor (XXIV-2622:7-11, 2623:1). He later testified that in 1943-1945 he *did not know enough English* really to follow the defendant's broadcasts. (XXIV-2648:18-2651:4, 2651:19-23.)

Nii—XXV-2674ff.—“why don't you stop fighting and listen to good music—why don't you go back to your loved ones in the States instead of being fighting in the jungles in mosquitoes from fox-holes”. On cross-examination he said he remembered definitely only the words “jungles”, “mosquitoes”, “foxholes”. (XXV-2725:12-15.)

Higuchi—XXV-2742—good time with girls in islands? miss wives and sweethearts, ice cream, listening to juke boxes.

This witness claimed she listened to defendant's broadcasts for recreation *over the monitor* while the witness herself was at work typing. (XXV-2773:3-15.)

Villarin—XXVI-2849ff.—“why stay in foxholes when your girls are running around with other men—about time you went home—have fun back home”.

As will be shown *infra*, this witness's description both of the broadcasting studio and of the person broadcasting

was contradicted by other witnesses. There is a serious question whether he was even referring to the right person.

(2) Witnesses who claim to have heard defendant's broadcasts over radio.

The witnesses who claimed to have heard defendant's voice on their receiving sets must be viewed against the background of certain other evidence, most of it coming from the *prosecution*. Defendant broadcast on the *Zero Hour* which ran from 6-7 p.m., Tokyo Time. (*Okii*—IX-728:21-23, 782:21-5, 786:20-788:13; *Mitsushio*—XIII-1251:3-6, X-924:1-4; *Ishii*, XVII-1828:10-14; *Nakamura*, XXI-2290:5-2291:25; *Moriyama*, XXIV-2544:9-11, 2549:19-22, 2557:18-21; *Gov't Exhibit 25* pp. 1 (heading), 4 (heading), 10 (ft.), 12 (heading); *Penniwell*, XVI-1634:3-7, 1640:11-14, 1647:17-18; *Sodaro*, XVII-1731:13-17; *Roth*, LII-5864:4-12.)

Of the above witnesses, the Japanese give Japanese standard time (Japan was on standard time throughout the war, *Momotsuka*, XXIII-2422:16-20). *Penniwell* and *Sodaro* give Eastern wartime and *Roth* gives both Eastern and Hawaiian wartime. *Gov't Exhibit 25* gives Eastern wartime in its headings and Japanese standard time in its text on page 10. Defendant's Exhibit T (XLVI-5139) is a World Time Map showing the different time zones, as they existed during the period covered by this case (modified by "wartime" in the United States and Australia). While the *Zero Hour* ran from 6-7, defendant ordinarily left at 6:30, when her part of the program was concluded. (*Okii*, IX-787:20-788:13; *Moriyama*, XXIV-2549:19-22; Philip d'Aquino, XLIV-4883:10-14.) According to defendant her-

self she had stayed the full hour from November, 1943, to May, 1944; from May, 1944, to the end of the war she left at 6:25 or 6:30 (Def. XLV-5012:15-5013:6). Exhibit S (XLVI-5139) consists of calendars for the years in which defendant broadcast. She always had *Sundays off* (*Oki*, IX-786:15-19; *Mitsushio*, XII-1152:3-7; *Ishii*, XVIII-1854:21-1855:1; *Moriyama*, XXIV-2559:7-14). During the entire time that *Moriyama* was on the Zero Hour from May, 1944, to the end of the war (*Moriyama*, XXIV-2544:2-8) she also had *Saturdays off*. (*Moriyama*, XXIV-2559:11-14; Defendant, XLV-5017:5-16.)

The Zero Hour was entirely in English. (*Penniwell*, XVI-1649:8-9; *Moriyama*, XXIV-2578:20-22; *Cousens*, XXIX-3311:19-25; Def. XLVI-5110:12-18.) *With these circumstances in mind, we summarize the testimony of the prosecution witnesses who claimed to have heard the defendant on their receiving sets.*

(See Appendix p. 2.)

Apart from discrepancies in the testimony of these witnesses, it should be noted that *each always reports broadcasts about the particular island on which he happens to be, or about the particular part of the United States from which he happens to come.*

The defendant denied each and all of these alleged broadcasts. (Def. XLVI-5105-5118.) Other witnesses from both sides, who were on the Zero Hour for extended periods of time said either that defendant had not broadcast any or most of the foregoing items or that they did not remember her having done so.

(*Nakamura*—XXII-2337-2341;

Sugiyama—XXIV-2532-2538;

Moriyama—XXIV-2583-6;

Cousens—XXIX-3314-24, XXX-3326-32;

Ince—XXXI-3486-92;

Reyes—XXXII-3621-30;

Ghevenian—R. 356-57, 370-71;

Hayakawa—R. 385;

Saisho—R. 402;

Yanagi—R. 420-21.)

Members of the American Armed Forces, called by the defense, who *had listened regularly to the Zero Hour on their radios* (and who, unlike the prosecution witnesses had the time, etc., correct) *gave similar testimony*:

Whitten—XXXVIII-4316:22-4317:1, 4324:12-17, 4325-4335;

Stanley—XXXIX-4344, 4346:14-4357:5;

Speed—XXXIX-4397:3-20, 4402:19-4403:25, 4405:10-24, 4406:21-4407:1;

Paul—XL-4452:7-18, 4454:4-25, 4460:2-23, 4466:6-10;

Mosier—XL-4470:25-4472:2, 4475:20-4476:13.

Moreover, witnesses on both sides gave evidence of *other Japanese programs* which did broadcast some of the material attributed to defendant *and at the times of day* fixed by the prosecution G. I. witnesses. The following summarizes the testimony on this subject which was *admitted* (much was blocked by objection and these rulings constitute one ground of appeal):

Tsuneishi—V-367:11-371:16;

Oki—IX-745:3-746:14, 753:10-754:13;

Cousens—XXIX-3316:9-3317:9, 3318:7-3320:24;

XXX-3380:15-3385:3 *Cousens is particularly specific with reference to the material on the other programs and the hours when they were broadcast*);

Hayakawa—R. 379;

Saisho—R. 401;

Paul—XL-4463:2-6;

Mosier—XL-4475:6-19;

Sexton—XL-4484:17-4487:16;

Kanzaki—XLI-4575:2-4, 4581:11, 4584:5-8, 4585:11-4586:11. (Mrs. Kanzaki is likewise specific in giving the time and subject matter of other broadcasts.)

Defendant—XLV-5073:1-5074:24, XLVI-5075:17-5077:16.

There were many women broadcasters who appeared on the Zero Hour in addition to the defendant. They were Ruth Hayakawa, June Suyama, Mieko Furuya (later Oki), Catherine Muraoka, Margaret Kato and Mary Ishii.

(Noda—R. 342; Ghevenian (Sagoyan)—R. 358; Hayakawa—R. 380-1; Saisho—R. 403; Ozasa—R. 439, 441; Defendant—XLV-5073; *Tsuneishi*—V-367-370; *Mitsushio*—XII-1152-3, XIII-1302-3; *Oki*—IX-760-61.)

There were many of the same women and other women who broadcast from Radio Tokyo as disc jockeys, announcers and commentators at all hours of the day and night. Among these were Ruth Hayakawa, June Suyama, Mieko Furuya, Catherine Muraoka, Margaret Kato, Diana Powers, Mary Ishii, Founny Saisho, Miss Nakanshi, Kay Fujiwara, Frances Topping, Lillie Abegg.

(Defendant—XLV-5074, XLVI-5075-76; *Tsuneishi*—V-367-75; *Mitsushio*—XIII-1301-04.)

Further, the Japan-controlled broadcasting stations in Japan, Singapore, Arai, Shanghai, Manila, Formosa, Korea, Bangkok, Saigon, Nanking, Rangoon, Java and

Hsinking were broadcasting in English at all hours of the day and night. Women disc jockeys, news announcers and commentators were broadcasting from these stations also.

(*Tsuneishi*—V-379-83, VI-384-93; Exh. 39; *Momotsuka*—XXIII-2421, 2424-25, 2427-28.)

The fact that Japan-controlled broadcasting stations filled the air with broadcasts in English by various women announcers day and night rendered it practically impossible for a given announcer's voice to be identified by listeners.

5. ALLEGED CONFESSIONS AND ADMISSIONS OF DEFENDANT.

The prosecution introduced various writings and statements of the defendant. They fell generally into three classes (1) signed confessions (Exh. 15, VIII-615; Exh. 24, XIV-1465) (2) papers on which the defendant had written her name followed by the words "Tokyo Rose" in quotation marks (Exh. 2, I-37; Exh. 14, VII-481; Exh. 22, XIII-1356; some of the eighteen scripts contained in Exh. 23, XIV-1465; Exh. 44, XXVI-2823; Exh. 74, XLVIII-5354); (3) various alleged oral statements.

We shall discuss the contents of Exhibits 15 and 24 in connection with the contention that both were inadmissible under the rules governing extra-judicial confessions and that their admission was prejudicial error. The "Tokyo Rose" signatures will be discussed in connection with errors in rulings on evidence regarding the applicability of this name to the defendant.

The alleged oral admissions of the defendant (and her own testimony on the matters involved) are summarized herewith.

(See Appendix p. 6.)

6. AID TO ALLIED PRISONERS OF WAR.

Witnesses on both sides testified without any contradiction that defendant brought food, cigarettes, medicine, a blanket, short-wave news of Allied successes to the Allied prisoners of war both at Radio Toyyo and Camp Bunka. The government witnesses on this point were:

Ishii—XVIII-1855:12-1856:10;

Mitsushio—XIII-1310:21-1311.2.

The defense witnesses were—

Cousens—XXIX-3249:7-24, 3252:2-3253:17, 3264:20-3267:23, 3270:19-3272:20, 3280:9-3282:16;

Phil d'Aquino—XLIII-4764-71;

Ince—XXXI-3503-5, 3509:3-3510:19, 3512:22-3514:11;

Henshaw—XXXVII-4172:13-4184:13;

Defendant—XLV-5034-5050.

See also *Ishii*—XVIII-1865:21-24 (if defendant did commit treason she was not cognizant of the fact).

7. TECHNICAL EVIDENCE.

The Government introduced technical evidence as to the receiving sets at the Portland monitoring station and the method of recording Exhibits 16-21 (*Penniwell* XVI-1614ff, *Green*, XVII-1740ff, *Baptist*, XVII-1803ff) and as to the

broadcasting apparatus and direction of the beam in Japan (*Tanabe*, XXII-2348ff, *Okamoto*, XXII-2365ff, *Momotsuka*, XXII-2388ff). The chief significance of this evidence is that the Portland equipment and personnel were shown to be so good that they could hardly have missed any broadcasts that were coming over, and certainly not whole series of broadcasts of the same nature or on the same subject. (*Penniwell*, XVI-1618:14-18, 1618:22-1619:7, 1621:17-19, 1622:14-20; *Green*, XVII-1744:4-10, 1753:21-1754:2; *Baptist*, XVII-1806:11-23).) That Portland was *well within* the range of receptivity is shown by the fact that witness Sodaro made a record from the much more distant station at Silver Hill, Maryland, (*Sodaro*, XVII-1719ff.) All this casts particular doubts upon the testimony of the government's witnesses who testified from unaided recollection that they heard all kinds of things which the Portland station apparently never picked up.

8. DEFENDANT "BROUGHT" UNDER ARMY GUARD.

The Government, to establish jurisdiction and venue, introduced evidence showing how defendant was brought to the United States. She was brought on an Army transport in the custody of Lt. Prosnak and WAC Maj. Stull, both of the regular army (*Van Eycken*, II-118ff; *Prosnak*, II-131ff, III-164ff; *Stull*, II-145ff). *By this evidence the Government established its own clear and open violation of 10 U.S.C. 15, which forbids the Army to be used as a posse comitatus.*

9. OTHER DEFENSE EVIDENCE.

In addition to evidence already mentioned the defense introduced evidence on the following subjects:

a. The issue of duress. The facts will be detailed when we discuss the issue.

b. That defendant always expressed herself as being pro-American; Cousens, XXIX-3308:19-22; Ince, XXXI-3512:7-16; Ito, XL-4509:3-4510:1, 4511:21-4512:9; 4513:6-11; 4516:22-4517:5; Kanzaki, XLI-4567:9-21.

c. That members of the Japanese broadcasting staff were instructed not to associate with the personnel of the Zero Hour, since the latter were "enemies of Japan", Kanzaki, XLI-4578:13-18.

d. Villarin testified that he saw defendant broadcasting alone in the broadcasting studio, presenting a profile view to a person entering the door, and wearing no glasses; the defense witnesses testified that the members of the Zero Hour were never alone in the studio while broadcasting; that the broadcaster in Studio 5 (from which defendant broadcast) presented a full-face view to anyone entering the door; that defendant always wore glasses when she broadcast—Whereas Villarin said Cousens introduced him to defendant, both Cousens and the defendant denied that. See *Nii*, XXV-2703:25-2704:17; Cousens, XXIX-3312:18-3313:4, XXX-3393:6-3394:14; Defendant, XLVI-5126-32.

See also:

Hayakawa, R. 385 (top) 388 (ft.);

Ozasa, R. 436-7 (defendant questioned by Kempeitai when Zero Hour played "Stars and Stripes For-

ever'' after the fall of Saipan! Ghevenian, R. 357, same incident;

Reyes, XXXII-3614:23-3617:11 (for prosecution evidence concerning this incident, see *Tsuneishi*, V-377:15-21, *Mitsushio*, XII-1179:21-1180:25.

e. The defendant was imprisoned thirteen months in Japan, 1945-6, on "suspicion of treason". (Def. Exh. N, XLVII-5191; Exh. O, XV-1586; Exh. P, XVI-1603) and the government has lost relevant evidence. (*Cowan*, XXVI-2827:8; also 2999, 3000.)

Evidence which the defendant offered but which was excluded will be discussed under errors of law.

SUMMARY OF ARGUMENT.

The defendant's contentions fall into two classes—those which would require directions to discharge her and those which would require a new trial.

1. CONTENTIONS CALLING FOR DISCHARGE OF DEFENDANT.

a. Since the United States legalized naturalization of its citizens to the citizenship of an enemy country during the last war, the adherence-aid-comfort clause of the treason statute was inoperative.

b. The year's imprisonment of defendant without formal charges in Japan coupled with loss of evidence denied her a speedy trial in violation of the VIth Amendment (or alternatively constituted former jeopardy and other vio-

lations of the Vth Amendment) and bars the present prosecution.

c. The uncontradicted evidence that defendant aided Allied prisoners of war casts a reasonable doubt upon her alleged treasonable intent, making the proof on that issue and consequently upon the whole case insufficient.

d. The United States cannot establish either jurisdiction or venue by showing that it used the Army as a *posse comitatus* to bring the defendant to the United States (in violation of 10 U.S.C. 15); hence there was no jurisdiction in the District Court.

e. Since the indictment was procured by perjured evidence, there was no jurisdiction to try the defendant.

2. CONTENTIONS WHICH IF SUSTAINED WOULD REQUIRE NEW TRIAL.

Contentions calling for a new trial will be grouped primarily for convenience in presentation. In some instances these will be made according to subject matter and cover both instructions and rulings on evidence under a particular subject. In other instances the grouping will be procedural, i.e., errors in rulings on evidence, errors in instructions, misconduct of the prosecutor.

The defense of *duress* will be treated as one subject, covering both errors in instructions and errors in rulings on evidence.

The same is true for the defense of the *Geneva Convention*.

All errors relating to Overt Act 6 will be grouped together—both erroneous rulings on evidence, misconduct of the prosecutor and erroneous instructions. Likewise all errors on the cross-examination of the defendant.

Erroneous admission of the *defendant's confessions* (Exhibits 15 and 24) will also be treated as a separate subject.

Separate treatment will be given the identification of defendant as "Tokyo Rose" and the denial to the defense of compulsory process for the attendance in Court of its Japanese witnesses.

Otherwise the errors will be considered under their *procedural classification* (instructions, rulings on evidence, prosecutor's misconduct) which will be *subdivided* by subject matter.

We consider the two major classes of contentions in order.

I. CONTENTIONS CALLING FOR DISCHARGE OF DEFENDANT.

A. INASMUCH AS THE UNITED STATES PERMITTED NATURALIZATION OF ITS CITIZENS TO ENEMY CITIZENSHIP DURING THE WAR THE ADHERENCE-AID-COMFORT CLAUSE OF THE TREASON STATUTE WAS INOPERATIVE.

During the recent war the United States permitted its citizens to become naturalized to the citizenship of an enemy belligerent. It is our position that this rendered the adherence-aid-and-comfort clause of the treason statute inoperative for the following reasons:

1. DURING THE RECENT WAR THE UNITED STATES PERMITTED
NATURALIZATION TO THE OPPOSITE BELLIGERENT.

The United States at different times has followed various policies with respect to the right of its citizens to expatriate themselves in wartime. Such expatriation is of at least two types: (1) where a person assumes the citizenship of an allied or neutral country; (2) where a person assumes the citizenship of an enemy country.

Under English law, no citizen could expatriate himself at all either in peace or war without the sovereign's consent.

2 *Kent's Commentaries*, Lecture XXV, 2 (p. *42).

Before the enactment of any legislation on the subject, the American Courts were in doubt as to what rule should apply in the United States. Kent gives the view that expatriation is permissible *except in wartime*.

2 *Kent's Commentaries*, Lecture XXV, 2 (p. *43).

"The writers on public law have spoken rather loosely, but generally in favor of the right of a subject to emigrate and abandon his native country unless there be some positive restraint by law, or he is at the time in possession of a public trust, or *unless* his country be in distress *or in war* and stands in need of his assistance.""*

In *Talbot v. Jonson* (1795), 3 U. S. 133, 1 L. Ed. 540, the first case on the subject, two of the justices gave dicta on the question. Justice Paterson argued (3 U.S. 133, 153) that expatriation was permissible only if legal under general laws, for otherwise "treason and emigration, or treason

*Italics in quotations added throughout, except where otherwise indicated.

and expatriation, would in certain cases be synonymous terms''. Justice Iredell pointed to the view of many authorities that there could be no expatriation in time of war and concluded that the right of expatriation was subject only to "limitation * * * such as the public safety or interest requires''. (3 U.S. 133, 163.)

Shanks v. Dupont (1830), 28 U.S. 242, 7 L. Ed. 666, involved the marriage of an American woman to a British officer in 1781—during the American Revolutionary War. The Court held that this did not divest her of her American citizenship—but on the general ground that citizenship cannot be relinquished without the sovereign's consent, rather than upon the special ground that the United States and Great Britain were then at war. (28 U.S. 242, 246.) *Inglis v. Sailors Snug Harbor* (1830), 28 U.S. 99, 125-6, 7 L. Ed. 617, 626-7, likewise contains language that citizenship cannot be dropped except by the mutual consent of the citizen and the sovereign. To the same effect was *U. S. v. Gillies* (1815), Fed. Cas. No. 15206 (Washington, Circ. Just.).

A contrary view had been expressed in *Juando v. Taylor* (1818), Fed. Cas. No. 7558, 13 Fed. Cas. 1179, 1181.

The statute of 1868, 15 U.S. Stats. at L. 223, gives unqualified approval to the right of expatriation. Nothing is said about a state of war.

In 1907, however, Congress enacted an express prohibition against all expatriation in time of war. (Act of March 7, 1907, 34 U.S. Stats. at L. 1228, Sec. 2.)

In 1940, when Europe was already at war, this prohibition was repealed by the Nationality Act of that year.

(See Act of October 4, 1940, 54 U.S. Stats. at L. 1137, 8 U.S.C., 101 ff.) The repealer is Section 504, appearing at 54 U.S. Stats. at L. 1172. The new sections of the Nationality Act of 1940 contain no such prohibition. In 1944, after the outbreak of the war, Congress enacted further legislation, permitting even *residents* to renounce American citizenship during wartime (8 U.S.C. 801 (i)), and made a number of administrative interpretations to the same effect.

8 U.S.C. 801 (i) was applied particularly to persons of Japanese ancestry. (See *Acheson v. Murakami*, 176 F. (2d) 953; also *Barber v. Abo*, Nos. 12195 and 12196 and *McGrath v. Abo*, Nos. 12251 and 12252.)

In the present case, where the defendant was *residing in wartime Japan*, the Government requested and the District Court gave an instruction reading in part as follows:

LIV—5961:7-13 “*She could have renounced and abandoned her citizenship together with its privileges and obligations at any time, but unless you find that defendant d’Aquino did in fact renounce and abandon her citizenship, the defendant d’Aquino, being a citizen of the United States, owed allegiance to her native country * * **”

Defendant excepted to this instruction as being argumentative (LIII—5931:9-11), but for the purpose of argument in this part of the brief we shall accept it at face value.

The above instruction is a great deal more than an ordinary jury instruction. *It is a statement of the position, policy and practice of the Department of Justice*

with respect to the actions of American citizens residing in an enemy country during the last war.

Administrative interpretations by the State and Justice Departments also contemplated not merely that American citizens (of Japanese ancestry) could shed their American citizenship during the war, *but that they could acquire Japanese citizenship.* See *Barber v. Abo*, Nos. 12195 and 12196, which arose out of proceedings to deport the petitioners *to Japan on the theory that they had acquired Japanese citizenship.*

In the present case, moreover, four prosecution witnesses and two defense witnesses testified that they had given up American citizenship in Japan *and acquired Japanese citizenship* during the continuance of the war. (*Mitsushio*, X-896:17-897:1; *Kuroishi*, XXI-2280:15-23; *Moriyama*, XXIV-2542:1-12; *Nii*, XXV-2675:22-2676:7, 2687:6-17; *Ozasa*, R. 434 ft.; *Nakashima*, R. 662.)

The Government itself brought out this fact on direct examination of each of its four witnesses. *This shows that the Department of Justice considers the procedure both legal and effectual.*

(We shall show, *infra*, that the same legal consequences would follow if the Government had authorized its citizens only to become stateless, rather than to assume the citizenship of the opposite belligerent.)

2. LEGAL NATURALIZATION TO THE ENEMY IN WARTIME MAKES THE ADHERENCE-AID-COMFORT CLAUSE OF THE TREASON STATUTE INOPERATIVE (GENERALLY AND AS APPLIED TO DEFENDANT).

We assume for purposes of argument that it is constitutional to permit naturalization to the enemy belligerent

during wartime. If this wartime policy were unconstitutional, the discrimination against the defendant would be, if anything, even more flagrant.

Three provisions are involved in the proposition that the Government's expatriation policy during the last war made the adherence-aid-comfort clause of the treason statute inoperative. They are the treason section of the Constitution (Art. III, Sec. 3), the Fifth Amendment to the Constitution, and the treason statute itself (18 U.S.C. 1—new numbering 18 U.S.C. 2381). The latter provides:

“Whoever, owing allegiance to the United States, levies war against them or *adheres to their enemies, giving them aid and comfort* within the United States or elsewhere, is guilty of treason.”

The present case was explicitly limited to the second clause (*italicized*). See instruction, LIV-5949:15-17.

In view of the government's naturalization policy, the adherence-aid-and-comfort clause of 18 U.S.C. 1 was unconstitutional both under Amendment V and under Article III, Sec. 3.

a. **The Adherence-Aid-Comfort Clause of 18 U.S.C. 1 was unconstitutional (on its face and as applied) under the Fifth Amendment.**

In federal matters the due process clause of the Fifth Amendment guarantees the same equal protection which is expressly required of the states by the Fourteenth. See *Yu Cong Eng v. Trinidad*, 271 U.S. 500, 526-8, citing the state equal-protection authorities in a Fifth Amendment case and holding (271 U.S. 500, 528) that there was “a denial * * * of the equal protection of the laws”. See also, *Sims v. Rives* (C.C.A. D.C.), 84 F. (2d), 871, 878, cert.

den. 298 U.S. 682; and *U. S. v. Yount* (D.C.-Pa.), 267 Fed. 861, 863, holding that equal protection is guaranteed by the due process clause of the Fifth Amendment.

To satisfy the requirements of equal protection, classification must have a rational relation to the problem and the end to be achieved. (*Goesaert v. Cleary*, 335 U.S. 464, 466—the equal protection clause “precludes irrational discrimination”; *Bayside Fish Flour Co. v. Gentry*, 297 U.S. 422, 429; *Kansas City So. Ry. v. Road Impr. Dist. No. 6*, 256 U.S. 658, 661.)

- (1) In view of legalized naturalization to enemy belligerent, **Adherence-Aid-Comfort Clause of 18 U.S.C. 1 violates the Fifth Amendment on its face.**

On the question of adherence-aid-and-comfort, there is no rational basis for distinction according to whether the originally American citizen has taken out formal naturalization or not. Certainly there is no rational basis for exculpating those who go through a formal naturalization and convicting of treason those who do not. If there is any difference, it runs the other way.*

Two features characterize a formal naturalization, both demonstrably irrelevant.

First, a naturalization is an open, formal declaration of adherence.

Second, a naturalization is a declaration of intention that the adherence shall be permanent.

*This case, of course, does not involve the question whether Congress could constitutionally adopt different policies for the Pacific and European theatres. All persons involved were in the Pacific theatre.

Obviously, a formal declaration of adherence does not make the adherence any less. If anything, it makes it clearer.

Likewise, a declared intention that the adherence shall be permanent is, at best, beside the point.

The constitutional definition of treason (Art. III, Sec. 3) includes *any* adherence—and certainly does not exclude adherence which is intended to be permanent. From a practical standpoint adherence-aid-comfort is equally injurious while it is being carried out, regardless of how long the citizen intends that it shall last. Here, again, if the intention to adhere permanently has any relevance at all, it should aggravate the treason, not nullify it. Consequently the naturalization to an enemy country is not a rational distinction for punishing adherence in one case and exonerating it in the other.

Nor does it have any rational bearing on the question of allegiance. The citizen owes allegiance to the United States before he takes out enemy naturalization. Formal “shedding of allegiance” is never anything but the first step in giving aid and comfort to the enemy. In practice it consists merely in filling out and signing papers and perhaps taking an oath. As we have already said, it comprises merely an open declaration of adherence and a declaration that the adherence is intended to be permanent.

So in each case we start with a citizen who owes allegiance to the United States. In one instance, there is a formal declaration of permanent adherence to the enemy, followed by active adherence and the giving of aid and comfort. In the second instance there is simply an active

adherence followed by the giving of aid and comfort. A formal declaration obviously has no bearing on the adherence-aid-comfort at all—at least none in favor of the individual. But the Government's policy during the last war legally sanctioned the naturalization of American citizens to the citizenship of the enemy belligerent. That being true, it is a violation of equal protection to punish alleged adherence-aid-comfort as treason merely because a citizen did not take out a formal naturalization in the middle of the war.

(2) The Adherence-Aid-Comfort Clause of 18 U.S.C. 1 denies equal protection as applied to this defendant.

In this case the discrimination against defendant is especially flagrant, because *all four of the former American citizens whom the Government called as witnesses and who had become naturalized Japanese during the war, were, like defendant, working at Radio Tokyo*. See *Mitsushio*, X-897:2-19; *Kuroishi*, XXI-2281:13-19; *Moriyama*, XXIV-2544:2-11; *Nii*, XXV-2676:8-19, 2703:25-2704:17.

Mitsushio was defendant's chief. (X-897:17-19.) He testified he gave her directions. (X-908:13-25.) *Nii* was stationed in defendant's own studio to spy upon her and to make certain that she broadcast things that were suitable to the Japanese high command. (XXV-2703:25-2704:17.) Most pointed of all, *Mitsushio testified that he ordered the defendant to make the alleged broadcast which constitutes Overt Act 6*—the only one on which defendant was convicted. See *Mitsushio*, XI-971:12-18, 974:17-20.

As we have shown, the policy of the Government was to recognize wartime naturalization to Japanese citizen-

ship. The prosecutor went out of his way on direct examination to establish that fact with each of its said four witnesses. Consequently, the immunity from prosecution for treason which they enjoyed was not merely the result of a failure to prosecute all cases. (Cf. *Masonic Cemetery v. Gamage*, 38 Fed. (2d) 950, 955, C.C.A. 9.) It was part of an affirmative governmental policy. The Government's witnesses engaged in the same activity as defendant, and unlike her, had an avowed intention of aiding Japan. The distinction that they were "naturalized" is practically and legally immaterial on the question of adherence-aid-comfort. If it makes any difference, it aggravates their acts.

Under these circumstances, prosecuting the defendant for treason while affirmatively exculpating them, is about as clearcut a denial of equal protection as can be imagined.

- b. In view of legalized naturalization to enemy belligerent Adherence-Aid-Comfort Clause of 18 U.S.C. 1 was unconstitutional under Constitution Article III, Section 3.**

Art. III, Sec. 3, the treason clause of the Constitution provides in part,

"Treason against the United States, shall consist only in levying War against them or in adhering to their Enemies, giving them Aid and Comfort."

In permitting wartime naturalization to the enemy belligerent, the United States authorized adherence-aid-comfort to the enemy *under certain circumstances and safeguards*. Title 8, U.S.C. 801 (i) expressly provided that a renunciation of American citizenship thereunder becomes

effective *only upon approval by the Attorney General*. Where adherence to Japan is permitted after naturalization, the Japanese naturalization order is adopted as the equivalent of a license.

Whether such a course of action was constitutional depends on whether the above provision of Art. III, Sec. 3, is construed as an affirmative command (that the named conduct shall constitute treason) or as a restriction (that nothing else shall constitute treason). As indicated above this question need not be answered in the present case: the policy was put into operation and would be no less discriminatory against defendant by reason of being illegal. The same thing holds true with respect to the line of argument which we shall now develop.

Since the Government authorized adherence-aid-comfort to the enemy under certain circumstances and provided certain procedure was followed, what it attempts to punish in this case is an alleged adherence-aid-comfort supposedly given under *unauthorized* circumstances—or *without taking the necessary legal steps*. In a word, the Government here proposes to punish *unlicensed* adherence-aid-comfort to the enemy. This is an extension of war policy in other fields, e.g., *licenses* are *authorized* for trading with the enemy; *unlicensed* trading is punished. 50 U.S.C. ch. 3A, Sec. 24(3)(a), (b). Laws making an act legal if licensed, illegal if not licensed, are familiar in American jurisprudence. In addition to 50 U.S.C. ch. 3A, Sec. 24(3) (a), (b), compare the statutes considered in *Casey v. U. S.*, 276 U.S. 413 (narcotics); and *U. S. v. Miller*, 307 U.S. 174 (firearms). There is no doubt that the United States has power to punish unlicensed adher-

ence-aid-comfort to the enemy. But where it permits adherence, etc., under certain circumstances, it cannot punish unlicensed adherence *as treason*.

That is true because Art. III, Sec. 3, gives a limiting definition of what may be punished as treason. It says treason shall consist *only* of "adhering to their enemies, giving them aid and comfort". If this means anything it means that treason shall consist only of adherence-aid-comfort *as such*. When we attempt to punish *unlicensed* adherence-aid-comfort we have an entirely different type of crime with different elements.

This distinction is of prime importance in the present case. In the *first* place, the defendant was not charged with unlicensed adherence-aid-comfort; in the *second* place, there is not now, and there never has been, any statute defining or punishing such acts; in the *third* place, any lesser crime would be barred by the statute of limitations. The last date mentioned in the indictment is August 13, 1945 (R. 3); Overt Act 6 is laid in October 1944 (R. 6); the indictment itself was returned October 8, 1948 (R. 7). Any lesser offense would therefore be barred by 18 U.S.C. 3282 or old Section 18 U.S.C. 582, which fix a three-year limit on noncapital offenses. Both of these sections were specially pleaded by the defendant to cover precisely the contingency of a possible included offense. (See, Motion to Dismiss Indictment, R. 54, 60.)

Since Art. III, Sec. 3, limits treason to adherence-aid-comfort *as such* it necessarily excludes the lesser offense of *unlicensed* adherence, etc., during times when certain types of adherence, etc., are permitted. The attempt to

punish the defendant *for treason* while the United States recognized wartime naturalization to Japanese citizenship therefore transcends the restrictions of Art. III, Sec. 3.

3. THE SAME RESULTS FOLLOW IF THE AMERICAN POLICY WAS SIMPLY TO PERMIT AMERICAN CITIZENS TO DROP THEIR CITIZENSHIP AND BECOME STATELESS.

The same result follows if all the above actions of the Government are taken simply to express a policy that American citizens might divest themselves of their citizenship and become *stateless* during wartime. The clear implication of everything that has been recited is that after having formally divested themselves of American citizenship, they were free to give adherence, aid and comfort to Japan if they wished. The legal steps are slightly different from what they would be in case of a direct naturalization, but the end result is the same: by fulfilling certain legal requirements a citizen could legally adhere and give aid and comfort to the enemies of the United States.

The prosecution of the defendant would still be unconstitutional for the same reasons. From the standpoint of adherence-aid-comfort, the legal proceedings do not furnish a rational basis of distinction, and a treason prosecution, against defendant merely because she did not go through those legal formalities is a denial of equal protection.

Alternatively, what the Government is seeking to punish in defendant's case is alleged adherence-aid-comfort *without a license* (or, generally, without the requisite legal formalities and authorization). Under the restrictions of Article III, sec. 3, that cannot be punished *as treason*.

B. DEFENDANT'S YEAR-LONG IMPRISONMENT IN JAPAN DENIED HER A SPEEDY TRIAL IN VIOLATION OF THE SIXTH AMENDMENT—ALTERNATIVE OBJECTIONS.

Defendant was arrested by the United States Army in Japan on October 17, 1945, as being "suspected of treason" under an order dated September 10, 1945. She was kept in custody of the Army until April 30, 1946, then turned over to the Department of Justice. The Department of Justice kept her in custody until October 25, 1946, when she was released. (See Def. Exh. P, XVI-1603, Exh. N, XLVII-5191, Exh. O, XV-1586; Def., XLVI-5172:11-5173:17, 5175:11-5176:11). This imprisonment denied her a speedy trial in violation of the VIth Amendment. See *In re Bergerow*, 133 Cal. 349; *In re Alpine*, 203 Cal. 731, and *Harris v. Mun. Court*, 209 Cal. 55.

Further, this imprisonment necessarily interfered with defendant's opportunity to gather or preserve evidence in defense of a possible treason charge, *for suspicion of which she was imprisoned* (Exh. P, *supra*). Two things aggravated the situation. In the *first* place, the defendant was held wholly or partly *incommunicado* during the entire year. In the *second* place, the Government actually lost evidence which it had obtained from the defendant and which would probably have aided the defense.

For the first month of her imprisonment, defendant was held *entirely* incommunicado. She was at Yokohama prison from October 17 to November 16, 1945. *During that period she was held wholly incommunicado*. (Def. XLVI-5173:16-5174:1). On November 17, 1945, she was transferred to Sugamo prison, where she stayed until her release on October 25, 1946 (Def. XLVI-5175:11-5176:4). She continued to be held *completely* incommuni-

cado until December 25, 1945. From then until her release on October 25, 1946, she was permitted to see no one but her husband. (Def. XLVII-5206:4-7; XLVI-5176:17-5177:4). Her husband was allowed to see her only once a month, 20 minutes at a time (Pray, XLIII-4712:14-17; See Def. Exh. N, *supra*, Def. Exh. BG, XLVII-5196, Exh. BI, XLVII-5196; and entries of April 20, 1946, May 15, 1946, June 11, 1946, July 4, 1946 of Exh. BJ, XLVII-5197; Exh. BK-XLVII-5197). She was not allowed generally to communicate with the outside world by mail. (Def. XLVI-5180:22-5181:3; cf. Def. XLVII-5209:1-10. An excluded piece of evidence, XLVII-5209:11-14 will be considered in another part of the brief). She made repeated requests for a speedy trial, none of which brought results (Def. XLVII-5207:5-11, 5213:4-10). She was not allowed to see an attorney (Def. XLVII-5206:6-7).

Moreover, the United States Government lost evidence which was material to the case and probably favorable to the defendant. When defendant was first arrested in Japan, Robert Cowan and Jack Kaduson, then in the U. S. Army and acting under orders, used some of the defendant's scripts for the purpose of making a movie under Army auspices. (Cowan, XXVI-2810:12-24, 2811:4-7, 2827:5-2828:4, 2828:15-24). *These scripts were lost while they were in the possession of the Army and the U. S. Attorney was not able to produce them at the trial.* (Statements of prosecutor DeWolfe, XXVI-2999:4-19, 3000:6-3001-1). Besides these, we have already mentioned the missing Hawaiian transcripts (*supra*, pp. 22-3, Roth).

**1. FACTS DENIED SPEEDY TRIAL IN VIOLATION OF
THE SIXTH AMENDMENT.**

U. S. v. McWilliams, 163 F. (2d) 695, 696, col. 2, (App. D.C.) treats the defense of a denial of a speedy trial very much like the defense of laches in equity cases. In that case delay in retrying a case after a mistrial, involving *assumed loss of evidence* was held to prevent an ultimate retrial.

The present case is much stronger: there is evidence of *actual* loss of evidence, and through the apparent negligence of Government agents. This comes as a climax to a year's incarceration in which defendant was held partly incommunicado. The incarceration was on "suspicion of treason": both it and the added limitations on defendant's opportunities to contact the outside world necessarily impaired her opportunity to gather and preserve evidence against an actual treason charge such as later developed. Since all extant scripts are favorable to the defendant, it may be inferred that others which she gave Cowan and Kaduson were no less so.

Where delay, a year's imprisonment of defendant, interference with her opportunity to communicate and loss of probably favorable evidence by Government agents are all combined, the situation certainly is one where the Government has denied defendant a speedy trial within the meaning of the VIth Amendment. Such denial is a bar to the present prosecution.

2. ALTERNATIVELY IMPRISONMENT AND RELEASE PUT DEFENDANT ONCE IN JEOPARDY OR ARE RES JUDICATA.

Defendant was arested on suspicion of treason (Exh. P) and was punished by imprisonment for one solid year and

then was released unconditionally. (Phil d'Aquino XLIII-4812:17-24; Defendant, XLVI-5176:7-11.) Inasmuch as this imprisonment and release amount to the bringing and dismissal of charges, they constitute former jeopardy or *res judicata*.

3. ALTERNATIVELY, PROSECUTION AFTER KNOWN LOSS OF EVIDENCE DENIES DUE PROCESS GUARANTEED BY FIFTH AMENDMENT.

Apart from its aspects under Amendment VI, prosecution after known loss of evidence was a denial of due process under Amendment V.

The Government pressed the prosecution with full knowledge that relevant and highly material evidence had become lost, and lost by its own agents. This applies both to the scripts taken by *Cowan* and *Kaduson*, and to the Hawaiian records which were either destroyed or suppressed. (See *Roth*, LII-5849, 5855, 5866-7, 5870, *supra*.) We have above shown why the scripts and records were probably in defendant's favor. The Government, having had possession of them, must be charged with knowledge of their contents. Despite these circumstances it not only pressed the prosecution knowing that evidence probably favorable to the defendant had become unobtainable through its own acts. Further, it attempted to give the defense, the Court and the jury the false impression that the only reason why it did not produce more scripts was that *the Japanese* had destroyed the others. (See pp. 22-3, *supra*.)

Mooney v. Holohan, 294 U.S. 103 held that it is a denial of due process for the state knowingly to prosecute a case upon perjured evidence. We contend that the same

is true where the Government knowingly prosecutes upon incomplete evidence where (a) there is good reason to believe that the missing evidence is favorable to the defendant, (b) the evidence has become unavailable because of the Government's own acts, whether of routine destruction, negligent loss, or intentional suppression. In the present case these circumstances are aggravated by a third one, that (c) the Government sought to give the false impression that the missing records were unavailable solely for reasons other than its own acts or default.

4. SUMMARY.

In this case defendant was imprisoned for a year on "suspicion of treason". She was denied counsel and held wholly or partly incommunicado. All these things necessarily interfered with her opportunity to gather and preserve evidence for defense against an eventual treason charge.

Relevant and probably favorable evidence was lost, suppressed or destroyed by government agents between the beginning of her imprisonment and her trial. To proceed with the prosecution after that, either denies a speedy trial under Amendment VI or denies due process under Amendment V.

C. DEFENDANT'S AID TO ALLIED WAR PRISONERS CREATES A REASONABLE DOUBT OF GUILT AS A MATTER OF LAW AND MAKES EVIDENCE INSUFFICIENT TO CONVICT.

We have shown in our statement of facts that *witnesses on both sides testified* without contradiction that defendant gave aid and comfort to Allied prisoners of war in

Japan from November 1943, to the end of hostilities. That aid and comfort was given not only to those Allied prisoners who were regularly broadcasting under duress at Radio Tokyo, but to all those Allied prisoners who were imprisoned and held under duress by the Japanese at Camp Bunka. (See references in statement of facts, *supra*, pp. 15, 32.)

As this evidence comes from both sides and is uncontradicted, it raises a question of law. It is a piece of affirmative evidence which militates against the whole of the Government's case. We contend that it must be treated just like evidence in a civil case which defeats the plaintiff, as e.g., evidence of contributory negligence in a negligence case.

Defendant's position is that the presence of this uncontradicted evidence of aid and comfort to allied prisoners makes the government's case insufficient as a matter of law.

1. GENERAL RULE AS TO SUFFICIENCY OF EVIDENCE.

The present rule as to sufficiency of evidence has been stated in *Curley v. U. S.*, 160 F. (2d) 229, 232 (App. D.C.):

“The true rule, therefore, is that a trial judge, in passing upon a motion for directed verdict of acquittal, must determine whether upon the evidence, giving full play to the right of the jury to determine credibility, weigh the evidence, and draw justifiable inferences of fact, a reasonable mind might fairly conclude guilt beyond a reasonable doubt. *If he concludes that upon the evidence there must be such a doubt in a reasonable mind, he must grant the motion*; or to state it another way, if there is no evidence upon which a reasonable mind might fairly conclude guilt

beyond a reasonable doubt, the motion must be granted. If he concludes that either of the two results, a reasonable doubt or no reasonable doubt, is fairly possible, he must let the jury decide the matter."

This holding makes two points: (1) the question whether the record as a whole necessarily leaves a reasonable doubt is a question of law; (2) no more than a reasonable doubt is needed to entitle the defendant to a judgment of acquittal by the Court.

2. DEFENSIVE EVIDENCE NEED ONLY RAISE REASONABLE DOUBT.

The rule is the same for affirmative defensive matter as it is for gaps in the prosecution's case: it need only be sufficient to raise a reasonable doubt. If, taking all the evidence, there is indisputably a reasonable doubt on one essential issue, the evidence is insufficient. See the following cases: *Davis v. U. S.*, 160 U.S. 469, 484, 488 (insanity); *U. S. v. Marcus*, 166 Fed. (2d) 497, 504 (alibi); *Holloway v. U. S.*, 148 Fed. (2d) 665, 666 (insanity); *Reavis v. U. S.*, 93 Fed. (2d) 307, 308 (alibi); *Falgout v. U. S.*, 279 Fed. 513, 515 (alibi); *McCool v. U. S.*, 263 Fed. 55, 57-8 (alibi); compare also *Morei v. U. S.*, 127 Fed. (2d) 827, 834-5 (entrapment).

3. AID TO ALLIED PRISONERS RAISES REASONABLE DOUBT AS TO TREASONABLE INTENT.

The prosecution must prove as one element of treason, not only intent to do the act charged, but intent thereby to betray the United States, *Cramer v. U. S.*, 325 U.S. 1, 31,

“But to make treason the defendant not only must intend the act, but he must intend to betray his country by means of the act.”

The fact that defendant continuously gave aid to Allied prisoners of war certainly raises a reasonable doubt as to *whether she intended to betray the United States* by any other act which she may have done. Since the evidence upon this point *was given by witnesses on both sides* and is wholly uncontradicted, we submit that it raises a point of law. The point is that the proof on the issue of intent is legally insufficient. Because the evidence of intent is insufficient, the chain of proof is broken and the evidence is insufficient on the whole case. Since the insufficiency arises not from lack of proof but from the existence of contrary facts, it could not be cured on a new trial. The judgment should be reversed with directions to grant defendant's motion for judgment of acquittal.

Note: errors in rulings on evidence on this topic are discussed in a later part of this brief.

D. THE DISTRICT COURT WAS WITHOUT JURISDICTION.

1. INTRODUCTION.

Sec. 18 U.S.C. 3238 provides—

“The trial of all offenses committed upon the high seas or elsewhere, out of the jurisdiction of any particular State or district, shall be in the district where the offender is found, *or into which he is first brought.*”

It is settled that the Federal Courts are Courts of limited jurisdiction, having only such jurisdiction as is conferred by statute. (*U. S. v. Hudson*, 11 U.S. 32, 33, *Little*

York Gold Washing & Water Co. v. Keyes, 96 U.S. 199, 201; *Fink v. O'Neil*, 106 U.S. 272, 280, quoting *Cary v. Curtis*, 44 U.S. 236, 245.)

So far as 18 U.S.C. 3238 determines the place of trial *as between* different District Courts, it may be said to regulate venue. To the extent, however, that it requires that there must be *some District Court* which satisfies its terms, its provisions are jurisdictional. If there is *no District Court*, which fits the language of the statute, then no District Court has jurisdiction to try the alleged offense. Compare the principle set forth in *U. S. v. Johnson*, 323 U.S. 273, 276,

“Questions of venue in criminal cases, therefore, are not merely matters of formal legal procedure. They raise deep issues of public policy in the light of which legislation must be construed.”

Compare also *Johnson v. Eisentrager*, 94 L.Ed. Adv. Ops. 814, 830, par. V.

Defendant's position is that the phrase “first brought” in 18 U.S.C. 3238 means “legally brought”. Since the “bringing” of defendant to the United States was accomplished by using the Army as a *posse comitatus*, and therefore constituted a felony, she was never “brought” within the meaning of the statute. There is, therefore, no District Court which was authorized to try her. Defendant raised this issue by grounds 13, 14 and 15 of the second motion to dismiss the indictment (R. 86, 91) and by two requests for instructions: Nos. 156 (R. 297-8) and 38 (R. 292). They respectively set forth part of the text of 10 U.S.C. 15, and state “the words ‘first brought’ . . . mean brought under lawful custody”.

Section 10 U.S.C. 15 prohibits using the Army as a *posse comitatus* (except in Alaska) under penalty up to \$10,000 fine and 2 years imprisonment.

2. DEFENDANT WAS BROUGHT TO THE UNITED STATES FROM JAPAN IN CUSTODY OF THE ARMY AS A POSSE COMITATUS.

The Government proved as part of its own case that the defendant was brought to San Francisco on an Army transport and *under Army guard*. See testimony of *Capt. Van Eycken*, II-118-24, the master of the Army transport which took the defendant from Japan to San Francisco; *Capt. Prosnak*, II-131-45 and *WAC Maj. Stull*, II-145-49, both of the United States Army, who had defendant in their custody.

The official government documents introduced as defendant's exhibits, established the fact beyond question that the Army was acting on behalf of the Department of Justice.

The Army warrant of arrest (Def. Ex. BO, XLVII-5227) recites that the arrest is ordered,

“Upon complaint and sufficient information made to me by the Department of Justice, United States Government, as contained in Radio WCL 20431, from the Adjutant General, Department of the Army, dated 25 August 1948, the person described in paragraph 1 above is suspected of having committed the following crime:

“Treasonable conduct against the United States Government during World War II.”

(We mention the arrest to show that everything was done at the behest of the Justice Department. The important element, however, is the transportation—the “bringing”.)

The travel orders to *Capt. Van Eycken* (Def. Ex. F, III-166) state that agents of the Federal Bureau of Investigation will come aboard the transport and take defendant into custody upon arrival in San Francisco.

Defendant's Exhibit G (III-166) is a receipt for defendant to the Army from the Department of Justice.

The travel orders to *Capt. Prosnak* (Def. Ex. D, III-166), to *Maj. Stull* (Def. Ex. C, II-150) and to the defendant herself (Def. Ex. E, III-166), all contain the following provisions (with immaterial verbal variations):

“Upon arrival at San Francisco Port of Debarkation, Mrs. d'Aquino will be met by and placed in custody of proper civil authorities. *Department of Justice will reimburse the Department of the Army for all expenses incident to this travel.*”

This proves Departmental authorization.

3. GOVERNMENT CANNOT ESTABLISH JURISDICTION OF DISTRICT COURT BY SHOWING ITS OWN VIOLATION OF 10 U.S.C. 15.

a. The foregoing facts establish a clear violation of 10 U.S.C. 15 by the authorized agents of the United States. The Government cannot establish jurisdiction of the United States District Court by proving that its own agents committed (and were authorized to commit) a felony. This is upon the principle stated in cases like *McNabb v. U. S.*, 318 U.S. 332; *Upshaw v. U. S.*, 335 U.S. 410 and *Weeks v. U. S.*, 232 U.S. 383, all holding in various settings, that the government cannot profit by its own wrong. Compare the following from the *McNabb* case, 318 U.S. 332, 345,

“Plainly a conviction resting on evidence secured through such a flagrant disregard of the procedure which Congress has commanded cannot be allowed to stand without *making the courts themselves accomplices in wilful disobedience of law.*”

and the language from *Upshaw v. U. S.*, 335 U.S. 410, 414,

“Thus the arresting officer in effect conceded that the confessions here were ‘*the fruits of wrongdoing*’ by the police officers.”

This language refers to the phrase in *U. S. v. Mitchell*, 322 U.S. 65, 70—“*use by the Government of the fruits of wrongdoing by its officers*”.

The principle goes beyond the minimum requirements of the Constitution. (*McNabb v. U. S.*, 318 U.S. 332, 340; *Upshaw v. U. S.*, 335 U.S. 410, 414 N. 2.)

An application of that principle to the present case obviously forbids the government from *establishing jurisdiction*, and venue by proof of the felonious acts of its own authorized agents.

The foregoing would seem obvious, but was rejected in *Chandler v. U. S.*, 171 F. (2d) 921 (C.A. 1) and *Gillars v. U. S.*, C.A. D.C. No. 10187, decided May 19, 1950, 182 F. (2d) 962. The conclusions in both cases result from a misapplication of existing authorities.

(1) Both cases say that 10 U.S.C. 15 was passed for purposes of post-Civil war reconstruction, and imply, but do not hold that it has no other function.

(2) Both cases rely on decisions like *Pettibone v. Nichols*, 203 U.S. 192 and *Mahon v. Justice*, 127 U.S. 700. These authorities are demonstrably inapplicable to the

present case whether they were in point on *Chandler* and *Gillars* or not.

(3) *Chandler v. U. S.*, 171 F. (2d) 921, 935, says that 10 U.S.C. 15 has no "extraterritorial" effect and suggests that in any event, it would be impossible to convict the soldiers who acted as deputy marshals.

(4) *Gillars v. U. S.*, says that *constitutional guarantees* do not extend to conquered territory, expressly withholding decision as to whether the *statute* had "extraterritorial" effect. It also adds "There is no contention made that fruits of an alleged illegal arrest were used in obtaining appellant's conviction. Cf. *McNabb v. United States*, 318 U.S. 322 (1942)".

b. These objections are either not well taken, or inapplicable to the present case.

(1) 10 U.S.C. 15 extends to matters unconnected with the Civil War.

10 U.S.C. 15 was amended in 1900 (31 U.S. Stats. at L. 330). *This shows that it was intended to have prospective operation on matters not connected with Civil War reconstruction.*

Likewise the express exception of Alaska shows that the statute was not limited generally to the ex-seceded states. The statute must therefore be treated as one of current application.

(2) Cases like *Pettibone v. Nichols*, 203 U.S. 192, and *Mahon v. Justice*, 127 U.S. 700, are not in point.

Of the long list of cases cited in *Chandler v. U. S.*, 171 F. (2d) 921, 934, and the shorter list cited in *Gillars v. U. S.*, slip opinion p. 10, all are easily distinguishable.

They fall into three classes (some overlapping): (1) the state cases—which involve only the question whether there has been a violation of constitutional rights relating to states; (2) cases in which an illegal arrest or transportation was claimed to *defeat* jurisdiction which *existed independently* of the transportation; (3) cases in which the illegal bringing is done by unauthorized persons.

In no case does the evidence show what appears here, viz.: authorized commission of a felony by agents of the same sovereign which seeks to take advantage of the defendant's transportation within its borders. Nor did any arise under a statute which makes "bringing" an element of jurisdiction or venue.

The following are the authorities cited in *Chandler v. U. S.*, 171 F. (2d) 921, 934 (no *others* are cited in the *Gillars* opinion).

Pettibone v. Nichols, 203 U.S. 192. The petitioner had been kidnapped across the state line from Colorado to Idaho, and was held by Idaho authorities for trial in Idaho State Courts. This obviously involved only the question whether the United States Constitution had been violated—not the application of a federal statute to trials in the federal courts.

In re Johnson, 167 U.S. 120, was not even a case of transporting the defendant into a jurisdiction for trial. This is emphasized at 167 U.S. 120, 127. A statute created a new District Court for Indian Territory (Oklahoma) but granted it jurisdiction only in *noncapital* cases. The jurisdiction was later enlarged to include capital cases. *Before* the latter amendment, the marshal for the Indian Terri-

tory Court *arrested* the petitioner for murder. The trial was held *after* the enlargement of the Court's jurisdiction.

Held: that the trial Court had jurisdiction over defendant even though the original arrest may have exceeded the marshal's *then* jurisdiction.

Cook v. Hart, 146 U.S. 183. This was a case of transfer from Illinois to Wisconsin for trial in the Wisconsin state Courts. It therefore involves only constitutional questions between states and not the application of federal statutes to federal trials.

Mahon v. Justice, 127 U.S. 700, was a case of taking a prisoner from West Virginia to Kentucky for trial in Kentucky state Courts. *The proceeding was brought by the Governor of West Virginia, not by the prisoner.* The case again involves only *constitutional issues as between states*. Moreover, those who kidnapped the prisoner from West Virginia to Kentucky were held to have acted without authority (pp. 705-6):

“It is true that Phillips was appointed by the Governor of Kentucky as agent of the State to receive Mahon upon his surrender on the requisition; but no surrender having been made, the arrest of Mahon and his abduction from the state were lawless and indefensible acts, for which Phillips and his aids may justly be punished under the laws of West Virginia. The process emanating from the Governor of Kentucky furnished no ground for charging any complicity on the part of that State in the wrong done to the State of West Virginia.”

Ker v. Illinois, 119 U.S. 436, is by its title, another case involving a state prosecution. The United States Supreme

Court, of course, can pass only on constitutional limitations on the state.

The foregoing review shows that there are no *United States Supreme Court* cases dealing with the right of the United States District Courts to try a prisoner who has been brought into the country by the authorized felonious acts of Government agents.

The lower Federal Court cases cited in *Chandler v. U. S.*, 171 F. (2d) 921, 934, do not arise under 18 U.S.C. 3238 (or its predecessor section).

McMahon v. Hunter, 150 F. (2d) 498, merely holds that the manner in which the Court obtained jurisdiction is not open to review *on habeas corpus* (150 F. (2d) 498, 499). In the present case we are raising the point on direct appeal.

U. S. ex rel. Voight v. Toombs, 67 F. (2d) 744, did not involve 18 U.S.C. 3238. The defendant was arrested in the continental United States without a warrant, brought into the proper federal district, and there served with a warrant. *It does not appear what statute determined the jurisdiction of or venue in a particular federal District Court.* Presumably venue was determined by the place where some or all of the *crime was committed*. (See 18 U.S.C. ch. 211, and Rule Crim. Proc. 18.) The present case is different: *the act of "bringing" is what confers jurisdiction* on the United States courts. *Voight v. Toombs* merely holds that where *jurisdiction otherwise exists*, it is *not defeated* by an illegal arrest. In the present case, on the other hand, the question is whether the felonious transportation may be used *to establish jurisdiction*. Under

the principle of the *McNabb* and *Upshaw* cases, *supra*, it certainly cannot be so used.

Whitney v. Zerbst, 62 F. (2d) 970, is another case where the proper District Court was fixed by the place of commission of the crime rather than the transportation itself. As we have said, this and other cases hold that where jurisdiction and venue exist on other grounds, illegal transportation does not defeat them. But *where the transportation itself confers jurisdiction and fixes venue* the transportation must have been legal; it does not stand to reason that the government can prove an essential link in its case by showing its own felony.

In *U. S. v. Unverzagt*, 299 F. 1015, the defendant had been kidnapped from British Columbia into the United States, then legally arrested in the United States. *Held*: the kidnapping in Canada could be raised only by the Canadian Government; it did not invalidate the jurisdiction of the proper United States District Court, which depended on where the crime was committed. In the present case, however, *the transportation itself fixes jurisdiction and venue* (18 U.S.C. 3238).

In seeking to establish jurisdiction in its own Courts, the United States Government must at least not have committed a felony. In *Ex parte Lamar*, 274 F. 160, the defendant was removed from Atlanta penitentiary to New York for trial. It was held that even if the removal was illegal, the New York District Court could try him. Here again the transportation was raised *by the defendant to defeat jurisdiction*, not *by the government to establish jurisdiction*.

Stamphill v. Johnson, 136 F. (2d) 291, 292, and *Sheehan v. Huff*, 142 F. (2d) 81, are to the same effect.

A review of the above authorities leaves our original position intact. Under 18 U.S.C. 3238, the Government must show "the district * * * into which [the defendant] is first brought". This it recognized and proceeded to do. But its own proof showed that the "bringing" of defendant was illegal—that it constituted a felony under 10 U.S.C. 15. Where the Government insists that it has thus established jurisdiction in the San Francisco District Court we have a plain case of "*use by the Government of the fruits of wrongdoing by its officers*". The principles underlying *McNabb v. U. S.*, 318 U.S. 332 and *Upshaw v. U. S.*, 335 U.S. 410, also demand that the present conviction be reversed, with directions to the District Court to quash the indictment. (*U. S. v. Johnson*, 323 U.S. 273.)

(3)-(4) 10 U.S.C. 15 applies though the indictment charges acts committed in Japan.

On varying grounds, both *Chandler v. U. S.*, 171 F. (2d) 921, 936 and *Gillars v. U. S.* slip opinion p. 10, hold that 10 U.S.C. 15 does not apply to the present prosecution for acts done in Japan.

The "reasoning" of *Gillars v. U. S.* is wholly beside the point and need not detain us long. It quotes *Dooley v. U. S.*, 182 U.S. 222, to the effect that a conquering nation *has the power* to establish laws for conquered territory which are different from its domestic laws. It also says that the use of the Army of Occupation in Germany to make an arrest cannot "be characterized as a '*posse comitatus*' since it was the law enforcement agent in

Germany at the time of appellant's arrest''. Obviously it is beside the point that the conquering state *has the power* to make laws for conquered territory different from its own domestic laws. The question is not whether it has the power but whether it has done so here—particularly with respect to *general domestic laws* (18 U.S.C. 1) which it is still trying to enforce against its own citizens. The question before the Court is whether, as a matter of statutory construction, 10 U.S.C. 15 applies to one in appellant's position—not whether Congress has power to abrogate the section. And the mere fact that the United States *had the power* to make laws for occupied Germany, does *not* make it follow *automatically* (as the District of Columbia Court of Appeals seems to think, slip opinion p. 10, last paragraph) that 10 U.S.C. 15 is necessarily inapplicable. Moreover, the specific objection in the present case is not that defendant was *arrested* by the Army but that she was *brought* by the Army. Her custody in transit is independent of the type of government that happens to be governing occupied Japan.

Chandler v. U. S., 171 F. (2d) 921, 936, says

“In contrast to the criminal statute denouncing the crime of treason, this is the type of criminal statute which is properly presumed to have no extraterritorial application in the absence of statutory language indicating a contrary intent”.

U. S. v. Bowman, 260 U.S. 94, is the only case cited, and, we submit, it holds the other way.

Before reaching general principles discussed in the *Bowman* case, however, we first have the special circumstance that 10 U.S.C. 15 is *expressly made inapplicable*

to Alaska. This shows that it otherwise extends beyond the continental United States. If Congress had intended it to be generally limited to the continental United States it would not specially have excluded Alaska from its operation.

The only question is—*how far* is it applicable beyond the continental United States?

U. S. v. Bowman, 260 U.S. 94 lays down the principles *first*, that the question involved is one of statutory construction (260 U.S. 94, 97), *second*, that the Court must look to the nature of the statute to determine whether or not it is probably intended to operate beyond the continental United States. (260 U.S. 94, 97-8.)

10 U.S.C. 15 is a statute governing United States marshals—i.e., one of the auxiliary branches of law enforcement. It particularly excepts Alaska, but makes no other exception. At all times since its passage, the United States has had some criminal statutes with extraterritorial operation. 18 U.S.C. 1 is one; the statute considered in *U. S. v. Bowman*, 260 U.S. 94 is another.

Since 10 U.S.C. 15 makes only the exception of Alaska, and makes no other distinction between the enforcement of statutes having only local and those having extraterritorial operation, the reasonable view is that it is intended to apply to all crimes alike.

Furthermore, the process of bringing a defendant into the United States is well known in connection with extradition. The persons sent to receive the defendant from the asylum power are vested with all the authority of United States marshals. (18 U.S.C. 3193.) It is certainly

reasonable to hold that 10 U.S.C. 15 applies to this procedure and forbids delegating such work to the Army. And if 10 U.S.C. 15 applies to receiving fugitives from justice, it must be equally applicable to the enforcement of statutes (like 18 U.S.C. 1) having extritorial effect. *Chandler v. U. S.*, 171 F. (2d) 921, 936, also makes the point that

“Particularly, it would be unwarranted to assume that such a statute was intended to be applicable to occupied enemy territory, where the military power is in control *and Congress has not set up a civil regime*”.

The italicized words show a basic confusion of thought. The statement that “Congress has not set up a civil regime” refers to the *local government* of occupied territory. But the present case is not concerned with infraction of any regulation of the military government of Japan—it involves alleged violation of a *general domestic Act of Congress*—18 U.S.C. 1. That is precisely an area where Congress has “set up a civil regime”. The only basis for not applying 10 U.S.C. 15 is to say that Congress intended one procedure for criminal statutes limited to the continental United States and a different procedure for statutes also having extritorial operation—a view for which there is no support whatever.

All this applies with special force *to the transportation of defendant across the Pacific*, by which defendant was “brought”. That clearly has nothing to do with the military Government of Japan and should not have been done through the Army. An analogy is provided by the provisions of 18 U.S.C. 3183, dealing with fugitives “to a

country in which the United States exercises extra-territorial jurisdiction''. Under this section the *arrest* is to be made by the local authorities, but *the transportation to the United States* shall be made by the *agent of the demanding authority*. Since 10 U.S.C. 15 is qualified only by the exception of Alaska, it certainly forbids *making the Army the agent of the demanding authority* in any such undertaking. Since the ex-territorial operation of United States criminal laws and ex-territorial activities of United States marshals were known at the time of the enactment of 10 U.S.C. 15 and ever since, the broad language of the statute indicates it is meant to apply to such situations as well as proceedings limited to the continental United States. Compare *Scripps-Howard Radio v. F. C. C.*, 316 U.S. 4, 16,

“Indirect light is sometimes cast upon legislation by provisions dealing with the same problem in related enactments.”

Chandler v. U. S., 171 F. (2d) 921, 936, also expresses the fear that there would be no other way to bring appellant to trial. But the foregoing discussion answers that: United States deputy marshals could have been sent to Japan to take appellant to the United States. A Department of Justice agent took her into custody *in Japan* in 1946. (Def. Exh. O, XV-1586; see also Govt. Exh. 24, XIV-1457.) The same thing could have been done in 1948.

The transportation of defendant *under Army guard on behalf of the Department of Justice* was therefore a felony. It cannot be used to establish jurisdiction of the District Court under 18 U.S.C. 3238 “without making the Courts themselves accomplices in willful disobedience of

law''. (*McNabb v. U. S.*, 318 U.S. 332, 345.) The indictment must be quashed—(*U. S. v. Johnson*, 323 U.S. 273.)

E. SUMMARY.

The judgment should be reversed with directions to discharge the defendant for each of the following reasons:

1. During a war in which the United States permits naturalization to the enemy belligerent, it cannot punish "adherence-aid-and-comfort" to the enemy *as treason*.

2. By imprisoning the defendant for a whole year, by interfering with her right to communicate, and by losing, suppressing or destroying evidence which probably favored her, the Government denied her a speedy trial and lost its right to prosecute her.

3. The uncontradicted evidence from both sides that the defendant aided Allied prisoners of war casts reasonable doubt upon her alleged treasonable intent, and makes the entire evidence insufficient.

4. Since defendant was "brought" to the United States in violation of 10 U.S.C. 15, this bringing cannot be used by the Government to establish jurisdiction or venue and no District Court has jurisdiction to try her.

II. CONTENTIONS CALLING FOR NEW TRIAL.

The record abounds in erroneous rulings on evidence, misconduct of the United States attorney, and erroneous giving or refusal of instructions. Not only are these errors so numerous that their cumulative effect deprived

the defendant of a fair trial, but many are of such nature that *each standing alone* has been held to require reversal of a conviction.

A. THE ISSUE OF DURESS.

Much of defendant's evidence on the defence of duress was excluded. The effect of admitted evidence was emasculated by the Court's instructions. Defendant's requested instructions were refused *in toto*.

We consider the different elements of duress and the legal errors pertaining to each.

1. DEFENDANT'S BACKGROUND SITUATION.

The circumstance which pervades all of defendant's actions from 1942-45 is that she was in wartime Japan, a native of a country at war with Japan. This is the first fact to be kept in mind in assessing her acts.

Defendant requested and the Court refused the following instructions:

(No. 110, R. 288.) "The natural born subject of a belligerent country who leaves the land of his or her birth before the war and resides within the realm of the other belligerent without becoming naturalized or completely divested of his or her native rights is on the outbreak of war an alien enemy of the government under which he or she resides. 50 *Am. Jur.* 188.

(No. 111, R. 288.) "If you find that the defendant was an American citizen at the time of the outbreak of the war between the United States and Japan on Dec. 8, 1941, and that she resided in Japan at that time, then in Japan she had the status of an alien enemy. Cf. *Ludecke v. Watkins*, 335 U.S. 160."

Exception to the refusal of instructions was taken at LIII-5934-5 to Nos. 110 and 111 at 5934:23. (The printed record shows these instructions as having been refused because covered by other instructions. (R. 280, 288.) This, we believe, was a mistake. They were refused on the merits. In any event, no similar instruction was given. See Instructions, LIV-5942-94. The instruction at LIV-5960:19-20 merely says that defendant was an alien, not that she was an alien *enemy*.) The accuracy of these two requests has since been demonstrated by the following language in *Johnson v. Eisentrager*, 94 L. Ed. Adv. Ops. 814, 821:

(See Appendix p. 10.)

This quotation shows that the requested instructions were correct. Nothing was told the jury about defendant's *enemy* status in Japan, if they found her to be an American citizen. There was therefore a failure to instruct on the basic nature of defendant's position during the entire time of the acts charged against her.

2. FACTS ADMITTED IN EVIDENCE.

In this subdivision we summarize the evidence which was allowed to go before the jury. Then we show what was excluded and set forth the instructions given and refused. Finally we cite the authorities showing that the Court's rulings were error.

The evidence on duress which was admitted into the record falls into five general classes:

- a. Duress of persons in authority against defendant.
- b. Duress of persons in authority against others than defendant, communicated to defendant.

c. Duress of persons in authority against persons other than defendant, not communicated to defendant.

d. Duress of private persons against defendant.

e. Evidence on defendant's opportunity to quit her broadcasting job.

a. Duress against defendant by persons in authority.

The day after Japan started the war she received a visit from the head of the Alien Observation Division of the metropolitan police, was interrogated and told to take out Japanese citizenship. (Def. XLIV-4931-3.) She refused. Thereafter, throughout the war, she was kept under constant surveillance and was periodically visited by and had to report for interrogation to the metropolitan police. (Def. XLIV-4931-2, 4954-5; XLV-4956-4960) of the "Tokko Tai", i.e., "thought-control" police, XLV-4959.) She was also under constant surveillance and interrogated by the Kempeitai (Def. XLV-4956-7), and by agents of the "Tokko Tai", i.e., "thought-control" branch, of the Kempeitai. (Def. XLV-4957-4960.) See also, Okada, R. 773; Ghevenian, R. 368; Tillitse, R. 806-810; d'Aquino XLIII, 4762-4764; XLIV-4903. Her quarters were searched by the Kempeitai. (Def. XLV-4965-S.) She was required to obtain permits to move from place to place. (Def. XLV-4960-3, Exhs. WW, XX, YY.)

Seeking to avoid constant harassment from the police she asked Fujiwara, the head of the Alien Observation Division of the metropolitan police, in the middle of December, 1941, to be interned with other allied citizens in Tokyo but internment was denied to her. (Def. XLIV-4933.) She repeatedly asked the authorities to intern her

but each request was denied. (Def. XLV-4963-4, 4966. See *infra*, page 140.)

Being in wartime Japan, defendant had no protection from the government of the United States.

Takano was head of the business department of Radio Tokyo. (*Mitsushio* X-908:7.) He was personnel employment chief there. (Hayakawa, R. 381.) He occupied an office superior to Mitsushio's. (*Mitsushio*, XI-1093:6-12.) When defendant was transferred to her broadcasting job, he told Mitsushio that *the business department was lending her to the broadcasting department*. (*Mitsushio*, XII-1096:5-10.)

Takano gave the orders to the defendant in the following form (Defendant, XLV-4985:15-22):

“And I told him I did not want to be an announcer. And he said, ‘*You cannot forget you are an alien and you took this job as an alien with Radio Tokyo, didn't you?*’ I said, ‘Yes’.

“He said, ‘You have no choice. You are living in a militaristic country. *You take Army orders.*’ He said ‘*You know what the consequences are. I don't have to tell you that*’. So I said * * * there was nothing else I could say”.

Defendant also testified that at the same juncture, she had the following conversation with Mitsushio, Defendant, XLV-4983:22-4984:

“* * * I said, ‘I do not want to be an announcer’.

“And he said, ‘*It is not what you want. Army orders came through and Army orders are Army orders. If you want details, go see your boss*’, because everything in Japan—you don't move unless you took specific orders from your direct boss”.

Defendant, XLV-4984:10-12:

"All he told me, it was by the prisoners of war who was putting on this entertainment program that I had been chosen *and subsequently ordered by the Army*".

Though Mitsushio gave a different version of the conversation, he never directly denied this statement. (*Mitsushio*, XII-1096-1104.)

Major Tsuneishi confirmed that he had given the order for the expanded Zero Hour. (*Tsuneishi*, IV-289:14-21.)

Defendant testified that she did know the consequences of disobeying army orders.

Defendant, XLV-4990:18-20:

"* * * I told him that Takano had stressed the point that disobedience to Army orders would have certain consequences, *which I knew*."

She elaborated on this at XLV-5021:3-25, 5022:4-6.

Again XLIX-5504:4-12:

"Mr. DeWolfe. Q. Did you at that time know the consequences of a refusal to obey the Japanese army order?

A. Yes.

Q. What was the consequences that you feared?

A. Well, I did not have too many examples, but I had gotten all these stories from my cousin and Captain Ince and Major Cousens and these stories from Norman Reyes. They were all acting under army orders at Radio Tokyo. For refusal to obey, *it was the last you were heard of—taken out*."

Compare also Defendant, XLVI-5084:8-5086:6—where *she saw* Ince punched in the face for talking back to a guard.

The same thing was told her when she wanted to quit broadcasting.

Defendant, XLIX-5505:9-5506:7:

(See Appendix p. 10.)

Major Tsuneishi confirmed that the army gave orders to the Radio Tokyo personnel. He himself gave directions to Mitsushio—(*Tsuneishi*, IV-277:2-4, 278:8-20.) He “did not remember” whether the defendant ever asked to be discharged from the Zero Hour. (*Tsuneishi*, VI-430:12-14.)

Defendant was even afraid to dance for fear of being run in by the Kempei-tai. (Hayakawa, R. 385.) (Social dancing was an American custom and therefore frowned on in wartime Japan. See Yanagi, R. 424.)

In addition to verbal threats in case of disobedience, defendant was subject to continuous harassment and surveillance from the police.

Nii was stationed as censor right in her studio to see that her broadcasts were acceptable to the Japanese military. (*Nii*, XXV-2677; 24-2678:2, 2703:21-2704:17.) She was compelled to report regularly to the police and had to get travel permits even to commute from her home in a Tokyo suburb (Karuizawa) to her work in Tokyo. (Phil d'Aquino, XLIII-4762:21-4763:13, 4763:20-4764:7; Defendant, XLV-4956:17-4957:4—she had to leave her uncle's house because the police bothered them so much, 4957:9-4958:18—she had to report as often as twice a week. See Defendant's Exhibits QQ, XLIV-4848, *permit* to stay in Japan; RR, XLIV-4848, *permit* for residence; SS, XLIV-4919, *certificate* of identity; Exh. VV, XLIV-4951, *certificate* of employment; WW, XLV-4961, *permit* for jour-

ney; XX, XLV-4961, *permit* for fixed journey; YY, XLV-4961, *permit* to stay in Japan.)

The defendant testified she did not broadcast because of threats of physical duress (Def., XLIX-5502; 5504; XLVIII-5333-4) but because of fear (Def., XLVII-5289), mental torture. (Def., XLVII-5290.) She feared for her life to disobey the army order because the consequences of disobedience were known to her. (Def., XLV-5021-2; XLIX-5503-5506.)

b. Duress on others by persons in authority—communicated to defendant.

Takano's statement to defendant,—“You know what the consequences are I do not have to tell you that”—encompasses everything which had been reported to her about the consequence of disobeying military orders.

From time to time, the prisoners of war at Radio Tokyo gave her graphic pictures of these consequences.

(See Appendix p. 11.)

Cousens, XXVIII-3162:20-3169:7, told defendant how he had come to broadcast on Radio Tokyo, which included an account of the atrocities practiced on the prisoners of war —(3165:6-7) “the men were being starved and beaten and tortured” (3167:5-10):

“That one of our Australian boys had been beaten to death with a club, and that—for stealing a can of onions, and that a Tamil coolie who had rushed in mad with hunger, apparently, rushed in and tried to smash [snatch?] some food out of the arms of a Japanese private soldier, had been beaten and put to death with the water torture.”

The official word was that prisoners of war had no rights and would obey orders on penalty of death. (XXIX-3235:21-3236:8.)

Cousens also related independently the experiences which he passed on to the defendant. After his capture at Singapore he was first placed in solitary confinement. (XXVIII-3111:2-8.) A Japanese officer told him they could make him do anything they wanted. (XXVIII-3113:1-3.) Later he saw the Kempei-tai guards murder two of the prisoners in cold blood—each for trying to snatch a can of food. (XXVIII-3116:9-3119:24.) The witness describes the water torture at 3118:2-15, the fatal beating of the other prisoner at 3119:1-10. Japanese officers told the prisoners that they had no rights and would be shot for disobedience (XXVIII-3122:10-18; to the same effect, XXIX-3236.)

When Major Tsuneishi originally ordered Cousens to broadcast he informed him that the penalty for disobedience of Japanese army orders was death. (Cousens, XXVIII-3146:8-15.) (The contents of a second conversation were excluded, and will be considered, *infra*, XXVIII-3154-5.) Tsuneishi admitted he had said he ordered Cousens to broadcast. (*Tsuneishi*, V-366:23-367:10.) When Mitsushio told Cousens the Zero Hour was to be expanded, he made a hand motion to indicate decapitation, saying “it’s my neck as well as yours”. (Cousens, XXVIII-3179:22-5, 3180:23-3181:9.) Mitsushio denied this (*Mitsushio*, XII-1110:22-5) but Reyes testified to the same phrase. (Reyes, XXXII-3598:11-22.)

Cousens also related that when defendant told him about the conversation at which Takano ordered her to

broadcast, she reported that Takano told her the old familiar phrase that we have been told *that she was a foreigner, that she had no rights, and that she had to obey.*" (XXVIII-3184:21-24.)

Ince testified to experiences similar to those of Cousens—Tsuneishi, through an interpreter told them they had to obey orders "or else". (Ince, XXXI-3463:5-11, 3521:9-12); see also Henshaw. (XXXVII-4165:10-4166:1.)

Reyes told the defendant that he had received two direct threats against his life before he began broadcasting for Radio Tokyo—that it was a choice between broadcasting and decapitation; two of his co-workers in the Manila underground radio had been beaten to death; he had seen Japanese soldiers bayoneting civilians for hiding food; other civilians machine-gunned; and how he had seen Major Ince beaten (Reyes, XXXII-3665-75); Mitsushio threatened him with starvation if he did not continue to broadcast after the Philippine "liberation" in November, 1943. (Reyes, XXXII-3680:18-3681:7.) Tsuneishi, in referring to this subject, merely said "he did not believe" he had told Reyes his "life would not be guaranteed" if he did not broadcast. (*Tsuneishi*, V-322:18-21.)

c. Duress on others by persons in authority—not communicated to defendant.

The record contains some evidence of the duress practiced on the Allied prisoners at Camp Bunka. Schenk states that the Bunka prisoners were ordered to broadcast under threat of death (Schenk, R. 471-2.) Henshaw broadcast under duress (*Henshaw*, XXXVII-4155:21-23.) A prisoner named John Tunicliffe was kept in solitary confinement. (Parkyns, XXXVII-4199:11-17.) Capt. Kalb-

fleisch broadcast under duress. (Kalbfleisch, XXXVII-4278:19-4279:3.) Ince gave a thumbnail sketch of what he and his comrades experienced at Bunka. (Ince, XXXI-3567-71.) Ruth Hayakawa, working at Radio Tokyo was questioned by the Kempei-tai (Hayakawa, R. 384 ft.), she was afraid to talk to Nii, believing that he was a spy. (Hayakawa, R. 385, 394.) Founmy Saisho was being watched almost daily by a Kempei-tai agent. (Saisho, R. 406.) (These occurrences *at the radio station* are classified as "not communicated to defendant" because there is no direct evidence that they were communicated; but it stands to reason that defendant should have heard about such goings on.)

Furthermore, many of the Government witnesses, while denying all duress on direct examination, admitted on cross that they had variously been imprisoned, threatened with starvation, or at the very least, shadowed by the Kempei-tai. See:

Nakamura—XXII-2319:10-2320:19 (kept under constant Kempei-tai surveillance, which was true generally of foreign nationals).

Moriyama—XXIV-2588:24-2589:6 (assets partly seized, so he could not support his family).

Sugiyama—XXIV-2501:22-2502:2, 2520:12-2521:21 (arrested by thought police and imprisoned for three months).

Higuchi—XXV-2783:19-23 (testified she was in fear of Major Tsuneishi).

Villarin—XXVI-2857:19-20 (was in Bataan death march) 2858:1-17 sent from Philippines to Japan under threats of death.

d. Duress on defendant by persons not in authority.

The record in this case rounds out the picture of the wartime mistreatment of the Nisei. Earlier cases before the United States Supreme Court, this Court and the District Courts have shown how these unfortunate people were pushed around in the United States. (*Ex parte Endo*, 323 U.S. 283; *Korematsu v. U. S.*, 323 U.S. 214; *Hirabayashi v. U. S.*, 320 U.S. 81; *Acheson v. Murakami*, 176 F. (2d) 953; *Takeguma v. U. S.*, 156 F. (2d) 437; *Ishikawa v. Acheson*, 85 F. S. 1; *U. S. v. Kuwabara*, 56 F. S. 716.)

The evidence in the present case shows how they were mistreated in Japan.

The Nisei were maltreated in the United States because they were racially Japanese; they were maltreated in Japan because they were legally and culturally American.

In addition to official oppression through police surveillance and the requirement of police permits for every move, there were always threats of mob violence from the general populace.

We have already seen how the defendant had to leave the home of her uncle and live alone because the family could not stand the constant visits from the police. (Defendant, XLV-4956:22-4957:4.) As a result she was two months without a ration card. (Defendant, XLV-4960:13-18.) The neighbors called both defendant and her future husband "spies". (Phil d'Aquino, XLIII-4788:10-4789:19; Kido, R. 835.) *On Christmas, 1944, the defendant was almost run out of her neighborhood for having a Christmas tree—another American custom.* (Defendant, XLVI-5145:6-17.) Major Tsuneishi testified on behalf of the prosecu-

tion that the Japanese authorities considered the possibility of mob violence against the Allied prisoners of war. (*Tsuneishi*, VI-454:17-455:5.) Okada said the same regarding the civilian internees. (Okada, R. 785.)

e. Defendant's opportunity to quit her broadcasting job.

Some authorities on duress as a defense to criminal charges say that the defendant must have desisted at the earliest opportunity. In stating the facts upon this issue, we take the evidence of both sides (rather than merely that of the prosecution) because an important ground of error is in the giving and refusal of instructions. A defendant is entitled to instructions *on his side of the case*. *Driskill v. U. S.*, 24 F. (2d) 525, 526 (C.C.A. 9); *Little v. U. S.*, 73 F. (2d) 861, 867 (C.C.A. 10); see also *Weiler v. U. S.*, 323 U.S. 606, 611; *U. S. v. Brotherhood of Carpenters*, 330 U.S. 395.

(1) We have already called attention to defendant's testimony that when she did try to quit she was told "it would be a good idea not to quit. You know the consequences". (Defendant, XLIX-5505:9-5506:7) and to Tsuneishi's statement that he "could not remember" whether defendant asked to quit. (*Tsuneishi*, VI-430:12-14.) In addition, government witness Clark Lee testified that when defendant was first interviewed after the surrender, she said it would have been *suicide to disobey orders* (*Clark Lee*, VIII-567:15-16) and that "you cannot just say, 'I will quit' " (*Clark Lee*, VIII-569:8-9.) Defendant says she told him it would have been "suicide to quit". (Defendant, XLVI-5158:7-9.)

Besides, substantially all the money she earned from broadcasting was used to purchase food, medicine and

tobacco for the POW's. (Defendant, XLV-5041-2.) We direct attention to the fact also that had the Japanese authorities learned she was aiding the POW's she would not only have jeopardized her own life and that of the POW's but also the lives of the persons from whom she obtained those materials, and would have occasioned serious trouble for the Danish Minister from whom she acquired sugar (Defendant, XLV-5044), tobacco (5045) matches and soaps (5048).

(2) Quitting the broadcasting job could be done either legally or illegally. Defendant had no opportunity to quit illegally, *first* of all, because *she could not leave Japan*. She had cancelled her evacuation application on September 2, 1942 (Exhibit 7, I-80)—long before she began to broadcast (Nov. 1943) or before she was even employed as a stenographer at Radio Tokyo (August 1943). *Five months earlier—April 4, 1942—the State Department had written the memorandum which is Defendant's Exhibit A (II-116) and which made it impossible for her to return to the United States.*

There was therefore no opportunity to leave Japan.

(3) The evidence of the close surveillance kept by the various police forces bears directly upon defendant's opportunity to *quit illegally and yet remain in Japan*. She did manage to absent herself from time to time by various subterfuges. On American holidays she would phone in and say she was sick. (Defendant, XLIX-5449:8-10.) Compare also her testimony of feigning sickness to avoid bowing to the Emperor's palace. (Defendant, XLVI-5144:15-5145:5.) Around the time of her marriage she was absent for about two months. Oki, her superior at Radio Tokyo

first "wanted to know what the score was". (*Oki*, X-851:16-853:8, especially 851:24-25.) The next step was to send defendant a postcard notifying her to return to work. (Kido, R. 835-6; Phil d'Aquino, XLIII-4761:18-4762:9; Defendant, XLV-5072:3-11.)

When that brought no results an official came to her house to order her back. (Kido, R. 836, Phil d'Aquino, XLIII-4762:10-16; Defendant, XLV-5072:12-25.) Thereupon she returned to work. (Phil d'Aquino, XLIII-4762:19-20.)

The prosecution made much of the fact that no physical harm or other punishment had been imposed on her *up to that point*, implying that therefore she could have quit her job permanently. (Cross-examination of Defendant, XLIX-5486:5-23; cross-examination of Phil d'Aquino, XLIV-4858:11-4859:13.) The view of the prosecution seems to be that if she could get away with a two months' absence, she could get away with anything. If we concede for purposes of argument that this is a reasonable inference (we do not think so) it certainly is not the only one. The evidence also supports the inference that with a two months' absence she had *stretched things to the limit*.

She obeyed orders when an official came to her house, but if *she had continued to disobey* she would then have suffered Japanese army discipline. Since the record supports this inference, she was entitled to instructions on that theory.

(4) Defendant could not have quit legally. (See evidence as to consequences of quitting, *supra*.) It is true Major Tsuneishi testified that disobedience to orders would mean discharge from employment on Radio Tokyo.

(*Tsuneishi*, VI-418:2-4.) But he also said that such discharged employees could be conscripted by the army wholly according to the army's convenience (*Tsuneishi*, VI-438:17-22) and that he had considered conscripting *all* the Radio Tokyo employees. (*Tsuneishi*, VI-438:23-439:5.) In other words, any theoretical "right" which the defendant may have had to have her job was wholly illusory. Whenever she tried to exercise it, it could be abolished by a stroke of the pen, through a conscription order.

(5) In short, there was ample evidence that defendant had no practical chance of escape. She was entitled to instructions accordingly.

3. MATTERS EXCLUDED FROM EVIDENCE.

While some evidence of duress went to the jury, much more was excluded. *First*, and most important, the Court excluded certain evidence of duress directly on defendant. *Second*, it excluded evidence of duress on others *which was communicated to defendant*; *third*, it excluded evidence of terror held over the entire staff at Radio Tokyo, and *fourth*, the Court excluded nearly all evidence of duress exercised on the prisoners at Camp Bunka. *Since coercion is a matter of degree* (see *infra*) *excluding parts of the evidence is prejudicial error*.

a. b. Exclusion of duress on defendant, or on others and communicated to defendant.

The trial Court was quite inconsistent in its rulings. Almost identical pieces of evidence were sometimes admitted, sometimes ruled out. An independent series of errors developed when the Court refused to receive offers

of proof after sustaining objections to direct examination on defendant's behalf! Sometimes the Court wholly prevented the appellant from making a record. The cross-examination of the Government's witnesses was similarly curtailed when defendant tried to reach the subject of coercion.

First of all, the Court rejected considerable evidence of duress brought home directly to the defendant. At XLV-5023:9-12 the defendant was asked whether she had a "conversation with Captain Wallace Ince as to how he came to be working at Radio Tokyo and was being placed on the Zero Hour program?" Objection was sustained to this question on the ground that it called for *hearsay*. (XLV-5023:13-15.) We discuss the entire law of coercion *infra*.

But two points will show now why we consider this type of evidence admissible.

Coercion depends partly on the person's *state of mind*. *Shannon v. U. S.*, 76 F. (2d) 490, 493 says "coercion * * * must be * * * of such nature as to induce a *well-grounded* apprehension of death or serious bodily injury if the act is not done". Statements from Ince and others to defendant are offered *to show that she had a well-grounded apprehension*. Their admissibility is precisely covered by this Court's language in *Kasinowitz v. U. S.*, 181 F. (2d) 632, where it was said (p. 635):

"The Examiner statement was offered in evidence, and we regard it as highly relevant on the issue of *whether the witness may have a reasonable apprehension* that his answers to questions showing his knowledge of such groups may incriminate him."

(p. 636):

“Here is the same error we have before considered. The issue is not whether the facts exist. The issue to be decided by the court is whether appellants had reasonable ground for believing that the facts might be true.”

Statements made to defendant by the prisoners of war are offered to show that she had a reasonable ground for believing that she would get similar treatment if she disobeyed orders.

At XLV-5027:19-5029:25 the appellant was asked to relate conversations she had had with both Cousens and Ince concerning their mistreatment at Bunka prison. *Objections were again sustained on the ground of hearsay and irrelevancy.* (XLV-5028:13-15, 23-25; 5029:23-25.)

Cousens was asked to state the conversations in which “he communicated to the defendant the presence of the prisoners of war who were detained at Bunka, and the circumstances under which they were confined, and the abuse and mistreatment which they were compelled to undergo, and the fact of generalized starvation conditions prevailing at Bunka Prison, and the great number of beatings and other acts of brutality, that those facts were communicated to the defendant at Radio Tokyo by this witness”. (XXIX-3254:23-3255:6.) *The court refused to permit such questions.* (XXIX-3254:18-21: 3255:9.) There was a similar ruling at XXIX-3287:4-8 (Cousens).

At XLV-5030:8, 16 and 5031:10, objections were sustained as to *defendant's own observation* of the physical condition of Cousens and Ince. At XLV-5031:11-5032:24 the Court sustained like objections to still another con-

versation which defendant had with Cousens on the same subject. At XLVI-5132-4 defendant's counsel made offers of proof to cover this excluded evidence, as far as circumstances would permit. We were considerably handicapped in making a record, since the prosecutor and the trial judge took the following startling position (XLVI-5132:16-20):

"Mr. DeWolfe. We object to any offer of proof. The defendant already has a record, your Honor.

Mr. Collins. It isn't a question of the record, the law requires us, if your Honor please, to make an offer of proof.

Mr. DeWolfe. *What law? No law requires it or allows it.*

XLVI-5134:3-5——

The Court. I will repeat, you will have to address your questions to the witness on the stand and protect your record. *The court will not accept any offer of proof.*"

The need for an offer of proof after objection sustained to direct examination is elementary. Rule of Criminal Procedure 26; *Burt v. U. S.*, 139 F. (2d) 73, 75; *Hawley v. U. S.*, 133 F. (2d) 966, 973; *Sarkisian v. U. S.*, 3 F. (2d) 599, 600.

At XLVI-5088:2-20; 5090:20-25; 5091:3-14, objections were sustained to questions *put to defendant along the same lines*; at XLVI-5082:13-16 and 5083:1-25 the Court sustained objections to parts of a conversation with David Huga, who represented himself as *a liaison man from the army*, acting under directions of Maj. Tsuneishi. (XLVI-5081:4-6.)

At XLVI-5145:21-25, 5146:9-18, and 5147:1-15, the Court refused to let defendant testify as to *who the persons were* who almost ran her out of the neighborhood for having a Christmas tree in 1944; it likewise refused to let her give any testimony as to the activities of "neighborhood associations" which were active in wartime Japan. This latter testimony was offered, XLVI-5146:16-18 "To show the actions taken by the neighborhood associations in the vicinity where the defendant lived *against her because she was an American citizen.*

Okada's testimony that the neighbors yelled "spy" at both defendant and her future husband was likewise excluded. (R. 776, 778.)

c. Exclusion of evidence of terror over entire Radio Tokyo staff. Ruth Hayakawa was at Radio Tokyo with the defendant.

Testimony from any woman announcer at Radio Tokyo that *the entire broadcasting staff* was kept in a state of fear is certainly relevant with respect to the defendant herself. Yet the following answer in Hayakawa's deposition was withheld from the jury as supposedly irrelevant. (R. 394.)

(See Appendix p. 13.)

In connection with the dates in this answer, it should be remembered that *the defendant began broadcasting in November, 1943.*

d. Exclusion of evidence of duress on others, not communicated to defendant.

The Court excluded most of the evidence of the mistreatment of prisoners of war at Camp Bunka, both for disobedience of orders and otherwise. Like the evidence

of atrocities which was communicated to the defendant, this evidence was offered to show *first*, that she had “*a well grounded apprehension of death or serious bodily injury if the act is not done*”, *second* to show what in fact was covered by the threat “*you take army orders. You know what the consequences are. I don't have to tell you that*” (XLV-4985:20-21); *third*, it is relevant to show concerted plan on the part of the Japanese authorities. So far as it is offered to show that defendant had a *well grounded apprehension*, it is admissible on just the opposite theory from the *conversations* describing atrocities. The conversations are offered to prove that appellant had a well grounded apprehension because *such things were told to her*—they are not offered to prove the truth of their contents. The *uncommunicated* atrocities on the other hand are offered on the theory that the best proof that defendant's fears were *objectively* well grounded is that *such things actually happened*—and happened regularly, not merely by way of exception. Here follows a list of the instances in which the Court excluded evidence of atrocities not specifically shown to have been communicated to appellant. In each instance we first give the name of the witness in whose testimony the ruling occurred:

Tsuneishi, V-310:7-12—Reyes “bears on his back the scars from being kicked by the Japanese”—ruled out as “immaterial”.

Excluding proof of atrocities on Reyes also had a special significance beyond the exclusion of this type of evidence generally. For after inducing the trial judge to hold such evidence “immaterial” the prosecutor sneeringly argued to the jury that Reyes was despicable because he

supposedly had never seen active service in the war. See II Arg. 335:15-16:

“Combat action behind a microphone for a couple of months. What kind of business is that? A war hero!”

And again, II Arg. 336:7:

“And Reyes, a hero behind the microphone.”

In other words the prosecution first *excluded* the atrocities against Reyes as “*immaterial*”—and then argued that they did not exist. They argued that Reyes had never had a more severe experience than broadcasting *although they knew the facts to be otherwise*. They treated the *assumed* evidence as very material in their argument to the jury, although they had kept out the *actual evidence* as “*immaterial*” when it was offered.

Tsuneishi, V-334:24-337:2, 3—cross-examination as to Tsuneishi’s first interview with Cousens, excluded as “*immaterial*” (some of this *was* reported to defendant; we place it in the present category for the sake of simplicity).

Tsuneishi, V-364:21-366:17—cross-examination excluded as to the fate of one Williams, the only prisoner who objected when Tsuneishi ordered the Allied prisoner at Bunka to broadcast over the Japanese Radio.

Tsuneishi, VI-401:21-25—cross-examination excluded as to duress on Bunka prisoners when transported from the camp to the radio station in order to broadcast.

Oki, IX-724:11-725:15—cross-examination excluded on Tsuneishi’s first interview with Cousens (the prosecution objected to *all* these questions as “*immaterial*”. In only

one or two instances did they object on the ground of improper cross-examination. Objections to the testimony of the following witnesses *called by the defendant* was, of course, only on the ground of immateriality).

Schenck was a Dutch lieutenant, one of the Allied prisoners at Bunka. His deposition starts at R. 464 and extends to R. 535. *Almost all of his answers were ruled inadmissible.* He tells of the tortures which were practiced on the prisoners who were ultimately held at Bunka (R. 465-6); threats of death which were coupled with orders to broadcast (R. 468, 519) were permitted in answer to only one question. All evidence of the continuous starvation of the Bunka prisoners was excluded (R. 474-80, 487 ff). *The evidence of systematic starvation will be discussed again in connection with another issue—it emphasizes that the defendant was acting against the Japanese Government when she took food to the prisoners.* The fact that Kalbfleisch was taken out to be executed was likewise ruled out. (R. 479-84.) Beating of the Bunka prisoners was excluded. (R. 481 ff.) The number of Allied prisoners whom the Japanese forced to broadcast at Bunka was excluded. (R. 504 ff—at the *taking* of the deposition this evidence was elicited by the government's cross-examiner.)

Okada was a sergeant major of the Kempei-tai. He testified about their activities from first hand knowledge. (R. 771 ff.) The Court excluded his answers about the Kempetai organization. (R. 773—prosecution testimony about the organization of Radio Tokyo had previously been admitted. See *Tsuneishi*, III-226ff. *Mitsushio*, X-898ff.) The Kempei-tai's method of working and keeping

tab on foreigners was likewise ruled out. (R. 788-9.) *This evidence of the surveillance of foreigners was highly relevant on the issue whether the defendant could have quit her broadcasting job.*

The Court itself ruled out testimony as to the organization and activities of the Kempei-tai agents for no reason **whatever** except that government witnesses had tried to convey the impression that they were of an innocuous type similar to military policemen or the French gendarmes. (R. 788; cf. *Tsuneishi*, VI-435:16-20; *Tillman*, XV-1535:18-21.) *Obviously the fact that the prosecution has introduced evidence on a point does not foreclose the defense from introducing different or contrary evidence.* Rather one object of the defendant's case is to rebut the prosecution's witnesses.

Mrs. Kido, who was the defendant's landlady testified that her relatives and neighbors objected to her boarding and lodging the defendant—but that testimony was not allowed to go to the jury. (Kido, R. 832, 833.)

Cousens—was asked about the guards who were stationed around him when he was first told to broadcast—but an answer was not permitted. (Question, XXVIII-3122:19; ruling XXVIII-3139:2-4—here the ruling is based on the order of proof, but the evidence was excluded at all stages.) At XXVIII-3143:7-16 the Court ruled out testimony from Cousens as to how Japanese guards started to beat him when he objected to broadcasting. At XXVIII-3154:7-3155:13, Cousens is stopped from testifying what he told on his *second* interview with Tsuneishi; at XXVIII-3156:10-3157:5 he was not allowed to say whether he broadcast voluntarily or not. (All this testimony was

also highly relevant on another issue—since the prosecution argued to the jury that Cousens was a collaborator and that defendant kept company with collaborators. II Arg. 328:20-21, 329:24-330:4, 336:5-7. *Before making this argument the prosecution had done its best to exclude contrary evidence as “immaterial”!*)

Cousens was likewise not permitted to testify about the episode in which Capt. Kalbfleisch was taken away for execution (Cousens, XXIX-3259:25-3261:4) nor about the condition of the prisoners in the prisoner of war hospital. (Cousens, XXIX-3268:4-24.)

The Court likewise excluded Reyes' testimony as to the restrictions on his movements when kept at the Dai Ichi Hotel during part of the time he was broadcasting on the Zero Hour. (Reyes, XXXII-3582:5-23—the prosecution, however, was allowed to try to show how “comfortable” the prisoners were at the Dai Ichi, cross-examination of Cousens, XXX-3410:14-3412:14.) Reyes likewise was not allowed to testify as to whether he could speak freely while at the Dai Ichi (Reyes, XXXII-3585:14-20) nor as to the food which the prisoners received there. (Reyes, XXXII-3586:5-3588:24.) The prosecutor was sustained in objections that the question of food at Dai Ichi was “immaterial” although *Government's Exhibits 45 and 46* (XXX-3416, 3417) previously introduced in evidence, *dealt with exactly that. The prosecutor and the trial judge between them established one law of evidence for the prosecution and an opposite one for the defense!*

Just as the atrocities committed on Reyes were kept out of Tsuneishi's cross-examination, they were excluded from the examination of Reyes himself. (Reyes, XXXII-3670:15-22, 3675:12-3676:3, XXXV-3956:2-15.)

All this was climaxed by the *Court's refusal to permit the defendant to make an offer of proof* (XXXV-3957:22-3958:6):

“Mr. Collins. If Your Honor please, since the Court has ruled against us on the question of the admissibility of certain evidence, we would like to make an offer of proof concerning——

The Court. There will be no necessity of it. The Court has ruled and you have a record on everything that has occurred. There is no necessity to make an offer of proof.

Mr. Collins. *Your Honor is denying us the right to make an offer of proof on those grounds?*

The Court. *Let the record so show.’’*

As we have already pointed out, after excluding all evidence of torture on Reyes, the prosecution harangued the jury with the fraudulent argument that Reyes had never seen anything but “combat action behind a microphone”. (II Arg.-335:15.)

Henshaw was not permitted to testify to the beatings of prisoners at Bunka other than Ince (Henshaw, XXXVII-4166:14-18) nor to the removal of Kalbfleisch for execution (Henshaw, XXXVII-4168:22-4170:1), nor as to whether the Kempei-tai stationed at Bunka were uniformed or in plain clothes. Nor was the defense permitted to introduce Exhibit W for identification (XXXVII-4184)—the orders to the Wake Island prisoners, some of whom were later imprisoned at Bunka and forced to broadcast over Radio Tokyo. Exhibit W for identification reads in part as follows:

(See Appendix p. 14.)

This document is clearly relevant in showing that *the Japanese actually imposed the death penalty for trivial offenses*. It tends to show defendant's fears *well grounded* that such a fate would also befall one in her position.

Parkyn was likewise not permitted to tell how he came to broadcast. (Parkyns XXXVII-4195:12-19) nor as to the physical condition of the men at Bunka (Parkyns, XXXVII-4214:11-16) nor as to starvation conditions which made them eat guinea pigs, cats and dogs. (Parkyns, XXXVII-4214:17-4215:2; compare the excluded testimony in Schenk's deposition, R. 478-9.)

Similar questions to Cox were ruled out (Cox, XXXVII-4254:18-4260:22)—whether he, Ince and Kalbfleisch broadcast voluntarily and the circumstances of their doing so); also the condition of the Bunka prisoners. (Cox, XXXVII-4265:19-4267:21.)

The entire testimony of Captain Kalbfleisch was excluded. He was another one of the prisoners at Bunka. The defense sought to show that he had been in the Bataan Death March. (XXXVII-4271:9-15.) Beginning at XXXVII-4279:15 and going through to 4290:14 the witness was asked but not allowed to answer a series of questions dealing with the beatings, inadequate food and resulting physical condition of the prisoners at Bunka, and about his own removal for execution. See especially XXXVII-4282, 4284-87. The *reasons* why Kalbfleisch was taken away to be executed were likewise kept from the jury. (XXXVII-4286:2-18.) At the close of the day, the defense asked leave to make an offer of proof *in the absence of the jury* and were told that they would have to do so *in the jury's presence!* See XXXVII-4291:16-21:

“Mr. Collins. That would have to be done, of course, in the absence of the jury, if your Honor please. But I think it will only take a few moments on Monday, I am sure.

The Court. It will be in the presence of the jury. I will hear no testimony here unless it is in the presence of the jury.”

The Court also said that any offer of proof would have to be made by examining the witness. (XXXVIII-4294:5-8.)

For that reason the offer of proof on the next day took the form of repeating the questions to the witness and having objections sustained to them a second time. (XXXVIII-4293-4302.) *The Court did not permit defendant's counsel to state what he expected to elicit from the witness.* (XXXVIII-4302:3-4303:8.)

To a large extent the expected answers may be inferred from the questions themselves, which were intentionally leading. Apart from that, we shall show that *denial of opportunity to make an offer of proof is per se reversible error.*

Mrs. Hagedorn was not allowed to testify to the threat broadcast by the Japanese radio to execute all American prisoners of war (Hagedorn, XXXIX-4332:12-4334:2) nor was Mrs. Kanzaki allowed to describe the physical appearance of the prisoners at Bunka (Kanzaki, XLI-4580:11-15).

The proffered testimony as to treatment of the Bunka prisoners must be viewed in the light of the fact that *in other Japanese camps the Allied prisoners were apparently treated better.* Compare the following answers by Maj. Ince on cross-examination (XXXI-3536:9-14):

“Q. After your recollection has been refreshed, do you still say you were poorly fed?

A. Yes, I do.

Q. According to the American standards or Japanese standards?

A. *According to the standards at the prison camp where we were immediately before we were taken to the Dai Ichi Hotel.*”

In other words, Bunka was either a punitive camp or one which applied special coercion. *It is there that the Japanese kept the prisoners whom they used on broadcasts.* Cousens and Ince were transferred to Bunka, after having first been kept elsewhere. (Ince, XXXI-3464:21-3465:1; Cousens, XXIX-3253:18-25.) The foregoing evidence shows the kind of coercion *which was actually applied* by the Japanese to compel Americans to broadcast. The fact that such things actually took place, and took place on a large scale, tends to show that *apprehensions* which defendant had as to what might happen to her if she refused to broadcast were *well grounded*. They also elucidate Takano's statement (XLV:4985:20-21): “You take army orders. You know what the consequences are. I don't have to tell you that”.

4. INSTRUCTIONS GIVEN AND REFUSED.

By its instructions given and refused the Court *first* treated the issue of duress if it arose in a case where the defendant was able to call on the protection of her own government, and *next*, virtually withdrew even that issue from the jury. (We give authorities below to show that the defense of duress is different, depending upon whether the defendant is in a position to call on his or her own government for protection.)

a. General rule of duress presented to jury.

The trial Court gave only two instructions on duress—one general and one special. *It refused all of defendant's requests.*

(1) The general instruction begins at LIV-5977:5 and ends at LIV-5979:1. The appellant excepted to it as being too restricted and on the ground that the correct law was as stated in her requests. (LIII-5933:5-8.)

This instruction tells the jury that coercion means "some unavoidable circumstance, condition or fact, which leaves *no* choice of action". (LIV-5977:19-20.) It further says that "one must have acted under the apprehension of *immediate* and impending death or of serious and immediate bodily harm". (5977:24-5978:1.) There follows a paragraph which says (LIV-5978:2-7):

"Fear or injury to one's property or of remote bodily harm do not excuse on offense. That one commits a crime merely because he or she is ordered to do so by some superior authority, is, in itself, no defense, for there is nothing in the mere relationship of the parties that justifies or excuses obedience to such commands."

The reference to injury to property created a false issue, since no such duress was claimed.

While the second sentence above includes the words "mere" and "merely" it is nevertheless misleading, because it *gives no weight at all* to the fact that commands from the Japanese Government emanated *from the only authority* with which defendant had contact at the time. (Conversely, this part of the instruction excludes consideration of the fact that defendant could not then call on

the United States for protection.) At LIV-5978:8-10, the jury is told that “the force and fear * * * must continue during all the time of such service with the enemy”. This again is confusing. Where orders are given by a governmental authority exercising exclusive control, the threat of sanctions *is presumed to continue*. (See *infra*.)

We discuss these points below, together with the requirement which the instruction makes that the threat of death or injury must be “immediate”.

(2) The limited scope which the Court gave to the defense of duress is emphasized by the instructions which were refused.

In the *first* place the Court refused the requests to the effect that defendant need only *raise a reasonable doubt* by her defense of duress (cf. cases under part I-C, *supra*).

An illustration is Defendant’s Proposed Instruction No. 98, R. 313, as follows:

“If you find that the defendant did the acts charged in the indictment, but entertain a reasonable doubt as to whether or not she was acting under fear of bodily injury, beating or the like, then you must find the defendant not guilty.”

To the same effect are No. 99 (R. 313), Nos. 102, 103 (R. 314).

Secondly, the Court refused the following instruction which was modelled on one of the instructions *given in Kawakita v. U. S.*, No. 12061.

Defendant’s Proposed Instruction No. 92 (R. 311):

“As to any overt act or acts charged in the indictment and submitted for your consideration which

you may find to have been committed by the defendant, if you entertain a reasonable doubt whether the defendant did the act or acts willingly or voluntarily, or so acted only because performance of the duties of her employment required her to do so or because of other coercion or compulsion, you must acquit the defendant.”

This instruction relates to the defendant's right to obey orders from the Japanese Government and contradicts the sentence given at LIV-5978:3-7.

Defendant's request No. 93 (R. 311-12) states that governmental orders coupled with fear of death or serious bodily injury are a defense, but leaves out the element of *immediacy*. Defendant's request No. 94 (R. 312) says that she must be acquitted if she had good reason to feel compelled to broadcast by the Japanese.

Defendant's proposed instructions 96, 97 (R. 313), 100 (R. 313-14), 101 (R. 34) likewise set up the fear of death or serious bodily harm without reference to *immediacy* and request No. 104 (R. 314-15) calls the jury's attention to the defendant's position as a *civilian woman* and her probable capacity to resist threats of death or injury.

b. Special instruction devitalizing defendant's evidence.

Besides rejecting a great deal of evidence, the Court virtually annihilated the evidence which it let in, with the following instruction (LIV-5979:2-16):

“The fact that the defendant may have been required to report to the Japanese police concerning her activities is not sufficient. Nor is it sufficient that she was under surveillance of the Kempei Tai. If you find that she, in fact, was under such surveillance, it

is not sufficient that the defendant thought that she might be sent to a concentration or internment camp *or that she might be deprived of her food-ration card.*

“Neither is it sufficient *that threats were made to other persons and that she knew of such threats*, if you find, in fact, that such threats were made to her knowledge.

“Nor is it sufficient that the defendant commenced her employment with the Broadcasting Corporation of Japan and continued that employment and committed the acts attributed to her merely because she wanted to make a living.”

This instruction takes various elements of the appellant's defense and says that *each singly* is insufficient *as a matter of law.*

Exception was taken at LIII-5936:9-14, 17-18. Not only do we claim that even the individual items sometimes present an issue for the jury (see below) but the instruction is faulty in *wholly ignoring cumulative effect.* In fact when the proposed instructions were discussed under Rule 30, the trial judge said he would make a slight modification to cover this last objection (LIII-5936:15-6) *but failed to do so and gave the instruction in its original form.*

5. COERCION AS DEFENCE—RULINGS ON INSTRUCTIONS ERRONEOUS.

a. General law of coercion as defence.

(1) We already have pointed out that the defendant was completely at the mercy of the Japanese—it was impossible for her to call on the United States for protection.

Both English and American authorities agree that coercion is a broader defence under such circumstances than when the defendant is able to seek protection of the government to which he or she may owe allegiance.

The English law on this subject developed out of the Scotch rebellion of 1745-6, in which the last Stuart Pretender seized control of Scotland for several months. *Hale's Pleas of the Crown* (1778), *East's Pleas of the Crown* (1806) and *Hawkins's Pleas of the Crown* (1795) all review these cases and come to substantially the same conclusion on them (see below). There are no later English authorities. Two American cases, one arising out of the Revolutionary and one out of the Civil War, reach the same conclusion, either by decision or by dictum.

Hale's Pleas of the Crown (1778) first makes the basic distinction between times of war or insurrection and times of peace: 1 Hale P. C.—Ch. VIII, p. 49:

“*First*, there is to be observed a difference between the times of war, or public insurrection, or rebellion, and the times of peace; for in times of war, and public rebellion, when a person is under so great a power, that he cannot resist or avoid, the law in some cases allows an impunity for parties compelled, or drawn by fear of death, to do some acts in themselves capital, which admit no excuse in time of peace.”

(The law of the previous century had been more harsh. The Stuart Restoration in 1660 denied the defence of coercion by fear of death to the executioners of Charles I. See *Kelying's Crown Cases*, p. 16.)

Foster's Crown Cases (1776) makes the following statement (pp. 216-17):

(See Appendix p. 15.)

The italicized portion shows that the requirement of "immediacy" in the Court's instructions was error.

East's Pleas of the Crown (1806) adopts this text and expands upon it, giving the most extensive exposition of the subject (pp. 70-71).

(See Appendix p. 16.)

1 *Hawkins Pleas of the Crown* (1795) in the footnote to chapter 17, sec. 24 (p. 90) gives the above rule with two special remarks:

(1) The defendant may continue to obey orders as long as he "could not attempt an escape with probability of success."

(2) He adds "and *certainly it is not for private individuals, misguided by ignorance or heated by faction to determine the proper moment of resistance*".

Since these texts are all based on the cases of 1745-6 *they summarize the English law as it was before the Declaration of Independence*. The law of the United States must be *at least as favorable to the defendant* since it was the intention of the framers of the constitution to *mitigate* the English law of treason. See *Cramer v. U. S.*, 325 U.S. 1,

(p. 21) "But the basic law of treason in this country was framed by men who, as we have seen, were taught by experience and by history to fear abuse of the treason charge almost as much as they feared treason itself".

(p. 23) "The temper and attitude of the Convention toward treason prosecutions is unmistakeable. *It adopted every limitation that the practice of governments had evolved or that politico-legal philosophy to that time had advanced.*"

And see list of limitations put upon treason, 325 U.S. 1, 27-30.

The two American cases on the subject squarely make the distinction depend upon *whether the defendant has an opportunity to call for protection from the nation to which he owes allegiance*. First came *Miller v. The Resolution* (1781) 2 U.S. 1, 1 L. Ed. 263, which arose out of the surrender of Dominica to the Americans and French at the end of the American Revolutionary War. Dominica had been in British hands: the question was raised whether the terms of capitulation did not constitute treason against the British crown by the British subjects who agreed to it, and that therefore the capitulation could not be the source of private rights. (It will be remembered, that, while the fighting on the American continent ended with the surrender of Cornwallis in 1781 the technical state of war and the actual fighting between France and England continued until the Treaty of Paris in 1783.) The Court, however, held the capitulation of Dominica to be legally valid in all respects: the private citizen is entitled to make the best bargain he can when his sovereign is unable to give him protection. The Court says (p. 10):

“It must be admitted, that where the supreme authority is competent to protect the rights of subjects, a subject cannot divest himself of the obligation of a citizen, and wantonly make a compact with the enemy of his country, stipulating a neutrality of conduct; *but certainly he may enter into such an agreement where it is no longer able to give him protection*. In the present case, the British Crown was not able to secure to the owners their estates in Dominica, and therefore they had a natural right to make the best

terms they could, for the preservation of their property, for it is a general maxim of the law of nations, 'that although a private compact with the enemy may be prejudicial to a state in some degree, yet if it tends to avoid a greater evil it shall bind the state, and ought to be considered as a public good.' "

Respublica v. McCarty (1781), 2 U.S. 86, 1 L.Ed. 300, arose out of the Revolutionary War and discusses the defense of duress, but is not in point. The defendant was a soldier captured by the British! The Court held there was an opportunity to escape back to the American lines. *Thus it was not a case where the defendant is in territory wholly controlled by the enemy.*

The only other American case touching the point is *U. S. v. Greiner* (1861), 26 Fed. Cas. 36, Fed. Cas. No. 15262. Everything said on the subject is dictum; the *holding* went off on a point of venue. But the Court cites and approves the cases of 1745-6 and is careful to draw the distinction between situations where protection by the lawful government is available and where it is wholly cut off:

(See Appendix p. 18.)

As we shall show in the next section, the Court below departed from the foregoing law both in the instructions which it gave and which it refused.

(2) The *peace time* law of coercion is that the defendant must have "a well grounded apprehension of death or serious bodily injury if the act is not done." (*Shannon v. U. S.*, 76 F. (2d) 490, 493.) See also *U. S. v. Vigol* (1795), 2 U.S. 346.

Respublica v. McCarty, 2 U.S. 86, 87, *supra*, suggests by dictum that the threat of *starvation* is a good defense.

b. Under above law instructions given and refused were error.

Under the above authorities the Court erred both in the giving and refusal of instructions. It erred *first* in wholly ignoring the distinction between ordinary cases and *cases where the defendant cannot get protection from the power which claims her allegiance*; *second*, the instructions do not even give defendant the full benefit of the peacetime rule of coercion.

(1) Instructions ignore evidence that defendant could not get protection from the United States.

We have indicated generally that the instructions fail to give weight to the evidence that defendant could get no protection from the United States. We now examine them in detail.

a. Since the orders come from the Japanese Government when the defendant could get no protection from the United States it was incorrect and erroneous to instruct that (LIV-5978:5-7) “there is *nothing* in the mere relationship of the parties that justifies or excuses obedience to such commands”. (Italics added.)

Where the individual is *wholly in the power of a hostile government* such relation is at least a *relevant factor* in determining whether the defendant was justified in obeying rather than resisting its orders. To say there is “*nothing* in the mere relationship of the parties that justifies or excuses obedience to such commands” is palpable error. We believe this part of the Court’s instruction attempts to follow *Giugni v. U. S.*, 127 F. (2d) 786, which is

not in point. That case involved the crew of an Italian ship in an American (Puerto Rican) harbor. Orders came from the Italian Naval Attaché at Washington and from the master of the vessel. Obviously the crew members were not wholly in the power of either one: they could have sought protection of the American port authorities (127 F. (2d) 786, 791).

(b) Nor is the clause at LIV-5978:3-5 saved by the words “merely” and “in itself”:

“That one commits a crime merely because he or she is ordered to do so by some superior authority is in itself no defense”.

It is a defense that a person obeys commands where resistance would be futile. (*East's Pleas of the Crown*, p. 72, *supra*.) While the words “merely” and “in itself” are doubtless intended to exclude any additional facts, *no other instruction was given telling the jury the legal effect of such additional facts*. (We discuss below other parts of the same instruction.) With the foregoing as the only instruction on governmental orders, the jury was almost forced to conclude that such orders were irrelevant—which was not the case.

Consequently, the entire paragraph of the instruction appearing at LIV-5978:2-7 was prejudicially erroneous because it *denies all effect* to hostile governmental orders even where defendant could not call upon her own government for protection.

(c) The foregoing instruction is likewise erroneous in requiring that threatened death or harm must be “immediate”. (LIV-5977:25, 5978:1, 14, 20.) We have already

seen that both *East* and *Foster* expressly repudiate this requirement where the defendant is wholly in the power of a hostile government.

In fact, all reason is against such a rule where duress is imposed by those who control governmental machinery. In at least a large number of cases the victim would not be executed on the spot, but only after some form of trial. However sham and prearranged such a trial might be, it takes time. While the individual has no chance of resistance, he would not be executed "immediately" in any ordinary sense of the word. Both for this reason and on the authority of *East* and *Foster*, *supra*, the instruction *erred* in telling the jury that the defense of duress was valid only if the defendant could show that death or bodily harm would *immediately* follow disobedience.

(d) Finally the above instruction errs where it attempts to define the affirmative circumstances under which the defense of duress would be valid. The jury are told that they should acquit defendant if she acted (LIV-5978: 19-21)

"under a well grounded apprehension of immediate death or serious bodily injury to be inflicted by any *particular person or agent* of the Japanese government."

The italicized words are apposite for private, lawless duress, but not for duress by a government. They evoke the picture of a particular person holding a gun against the defendant's ribs, and ordering her to do something. That is the method of a private criminal, but not of a governmental organization. When governmental orders are enforced, the official who gives the order is usually

not the one who inflicts the physical punishment for disobedience. In the United States, infliction of punishment on civilians is done by a deputy marshal, whom the defendant, in most instances has never seen before. A military execution may be performed by a firing squad, of whom the prisoner certainly does not know beforehand that the particular individuals would be picked for that task.

So in the situation of the defendant: officials at Radio Tokyo gave her orders, but the actual infliction of punishment for disobedience would probably be carried out by another department. *Which members of the other department would be picked to perform that duty is something which defendant could not know in advance.*

In short, the instruction given that the defendant must fear death or injury *from a particular person* ignores the fact that the duress was imposed by a hostile government. It deprives her of the defence unless she is able to name the official who will personally inflict punishment. Instead, the instruction states the rule applicable where the duress emanates without color of law from a private person. Since the evidence shows governmental duress, this part of the instruction is basically erroneous and prejudicial.

(e) We have already shown that the defendant's requests which the Court refused raise the same issues we have just discussed. Refusal of the defendant's requests was error for the same reasons that it was error to charge as the Court did.

(2) Instructions even denied defendant the benefit of the full peacetime rule of duress.

The instruction at LIV-5979:2-16 deprives defendant even of the full benefit of the peacetime defense of coercion. It *tells* the jury that each of the following elements is insufficient *as a matter of law*:

First, that she was required to report her activities to the Japanese police;

Second, that she was under surveillance by the Kempeitai;

Third, that she was under surveillance by the Kempeitai and believed that she might be sent to a concentration camp *or* deprived of her food ration card;

Fourth, that threats were made to other persons and she knew of such threats;

Fifth, that she worked at Radio Tokyo in order to make a living.

(a) The instruction *did not tell* the jury anything about the *cumulative effect* of the above elements, or of all the evidence on coercion.

According to the peacetime rule, coercion is a defence if it “ ‘induce[s] a well-grounded apprehension of death or serious bodily injury if the act is not done’”. (*Shannon v. U. S.*, 76 F. (2d) 490, 493.)

Under such a rule, the *cumulative effect* of all evidence of coercion is the *only thing that matters*. The question is—in view of all the circumstances—did defendant have a well grounded apprehension of death or serious bodily injury? It is wholly beside the point to take individual items and tell the jury that, *standing alone*, a particular

item is insufficient. *And when a long series of items are each treated in that manner, the effect cannot but be prejudicial to the defendant.*

Such an instruction must inevitably make the jury lose sight of the issue of *cumulative effect*.

(b) If the instruction be viewed as a comment on the evidence, it is objectionable because one-sided. (See LIII-5936:9-11, 17-18, where we took that specific exception.) In effect, it tells the jury that if they disbelieve all the evidence except one item, that remaining item is insufficient. But comments on evidence *cannot single out the evidence of one side* for either favorable or unfavorable comment. *Williams v. U. S.*, 93 F. (2d) 685, 692-3 (C.C.A. 9); *O'Shaughnessy v. U. S.*, 17 F. (2d) 225, 228 (C.C.A. 5); *Hunter v. U. S.*, 62 F. (2d) 217, 220 (C.C.A. 5); *Minner v. U. S.*, 57 F. (2d) 506, 513 (C.C.A. 10); *Martin v. Canal Zone*, 81 F. (2d) 913, 913-14 (C.C.A. 5). *Viewed as a comment on the evidence, it was improper to tell the jury that each of a series of items was insufficient, without once mentioning the effect of a combination of several.*

(c) But the instruction errs not only in omitting cumulative effect. Even as to the single items, it was error to tell the jury that each was insufficient as a matter of law.

The question throughout is—*how much of a threat does the particular act carry?* If, in view of all the evidence in the case, any of the acts mentioned in the instruction (LIV-5979:2-16) gives rise to a well-founded apprehension of death or serious personal injury, then that item constitutes a defense. Whether each item in the light of all the evidence, does give rise to such an apprehension, *is a question for the jury*. Particularly is this true (1) of

threats made to others and communicated to defendant (LIV-5979:10-12) and (2) of withdrawal of her food ration card. (LIV-5979:8-9.)

We believe that *Kasinowitz v. U. S.*, 181 F. (2d) 632, 635, 636 holds that such communicated threats may *in themselves* be sufficient to raise a reasonable apprehension. Certainly it is conceivable that reports of what happened to others may induce a well grounded apprehension that the same thing would happen to defendant. And, we submit, the evidence recited *supra*, of such communicated threats is sufficient to make the issue one for the jury. Likewise, withdrawal of the food ration card may be tantamount to starvation. Whether or not, was for the jury to decide. As already pointed out, *Respublica v. McCarty*, 2 U.S. 86, seems to recognize starvation as a mode of duress. Practically it is an effective means of coercion.

Finally it was error flatly to charge the jury that the necessity of making a living was no excuse. (LIV-5979:15-16.) *Chandler v. U. S.*, 171 F. (2d) 921, expressly leaves the point open, but indicates that the rule would be *contra*, at least under certain circumstances:

(p. 945): "Nor does the present case necessitate any detailed examination as to how far an American citizen, caught in an enemy country at the outbreak of war, may, in order to earn a living and without the stigma of treason, accept employment which in these days of total war might conceivably be of some aid to the enemy war effort. Here, as elsewhere, there may be troublesome questions of degree."

The error in charging the jury *as a matter of law*, on a series of isolated items, is emphasized in a wartime case.

See quotation from *East's Pleas of the Crown*, p. 71, supra, App. p. 17: in the Scotch cases of 1745, the question of coercion was *always left to the jury on the whole evidence*.

c. **Summary.**

The instructions ignore the facts that defendant was wholly in the power of a hostile government during war-time, and that she was subject to the duress of governmental machinery, not merely of private lawlessness. A glimpse of her situation may be had from the words of Justice Jackson, nonetheless apposite because in a dissenting opinion: *Bowles v. U. S.*, 319 U.S. 33, 37:

"The citizen of necessity has few rights when he faces the war machine."*

How much more is that true of an alien enemy in a hostile country!

It is aggravated by the savage penalties which the Imperial Japanese Government was wont to impose in war-time—a matter of which the Supreme Court took judicial notice in *Johnson v. Eisentrager*, 94 L. Ed. Adv. Ops. 814, 820-21:

"While his [alien enemy in the United States] lot is far more humane and endurable than *the experience of our citizens in some enemy lands*, it is still not a happy one."

(P. 822):

"This is in keeping with the practices of the most enlightened of nations and has resulted in treatment of alien enemies *more considerate than that which has prevailed among any of our enemies and some of our allies*."

*The majority holding strengthens this observation, since it denied even the right which Justice Jackson wanted to grant.

The instructions wholly disregard this situation. Moreover, they do not even give defendant the full benefit of the peace-time rule. They charge categorically on matters which should have been left to the jury; and they fail to present the issue of cumulative effect.

6. COERCION AS DEFENSE—RULINGS ON EVIDENCE ERRONEOUS.

The foregoing exposition of the law makes it clear that the Court erred in its exclusion of various types of evidence.

a. Evidence of official duress brought home to defendant.

We have already discussed the admissibility of conversations in which defendant was told about the atrocities committed against those who disobeyed orders. (See pp. 88-9, supra.) The issue is the same as in *Kasinowitz v. U. S.*, 181 F. (2d) 632, and this type of evidence is admissible for the same reason. The issue is whether the defendant had a "well grounded apprehension". Evidence of conversations with others goes in, not to prove the truth of the contents of the conversations, but on the ground that such conversations are a factor in building up a reasonable apprehension.

Furthermore, the exclusion was prejudicial. It is true, some other evidence of the same type was admitted. But the question whether defendant had such an apprehension that she was afraid to disobey is a *matter of degree*. The effect of one or two conversations is not the same as that of a great number. This is recognized in *Acheson v. Murakami*, 176 F. (2d) 953, 959, where a *large number of reports* and rumors are set forth to give a full picture of the fear under which the Nisei lived who were interned in

the United States. *By excluding part of her evidence, the Court prevented defendant from showing in full force the circumstances which gave rise to her apprehension of death or serious injury if she should disobey orders.*

b. Evidence of duress on defendant by private persons (threats of mob violence).

Threats of mob violence are clearly relevant in determining whether a person acted under coercion. Defendant offered them in conjunction with evidence of official duress. This is precisely the same way in which such evidence was offered and held relevant in *Acheson v. Murakami*, 176 F. (2d) 953, 958-9. According to that decision, the trial judge committed patent error in excluding evidence of incipient mob activity against the defendant and her husband. Compare also *Moore v. Dempsey*, 261 U.S. 86, in which threatened mob violence was the sole element invalidating legal action.

c. Evidence of duress on others not communicated to defendant.

Evidence of duress on others, even where not communicated to defendant, was relevant on three grounds.

First, it showed *objectively* that defendant's apprehensions were "well grounded". "Well grounded" is an objective standard. The evidence of conversations (*supra*) goes to show that defendant's apprehensions were well grounded *on the basis of what she knew*. But it is equally relevant to show that her apprehensions were well grounded *in fact*. Evidence of how others had been treated goes to show that *what she feared actually occurred*: it was not merely a matter of imagination. Certainly that is a material factor in determining whether she was justified in obeying orders rather than resisting.

Second. According to defendant, Takano told her "You have no choice. You are living in a militaristic country. You know what the consequences are. I don't have to tell you that." (XLV-4985:19-21.) *This statement incorporates matters by reference, and evidence is admissible to explain the reference.* The statement is a *reference by Takano*, notwithstanding that he put in the sentence "You know what the consequences are". This sentence merely shows that he assumed defendant knew everything that he knew. But the whole statement refers to matters which Takano knew as a Japanese official. Evidence of the kind of punishment which the Japanese Government administered was relevant *to show the actual contents of Takano's threat.*

Third. Evidence of duress on others (particularly Exhibit W for identification, *supra*, p. 97) was relevant to show scheme or plan on the part of the Japanese officials.

Proof of such scheme corroborates the testimony of defendant's witnesses as to particular occurrences and aids in resolving the conflict between their testimony and the denials by the prosecution witnesses that any death threats were made (see *infra*).

It is well established that the *prosecution* may prove other offenses when they tend to prove *scheme, plan or system.* (*Lisenba v. California*, 314 U.S. 219, 227-8; *Johnson v. U. S.*, 318 U.S. 189, 195-6; *Smith v. U. S.*, 173 F. (2d) 181, 185 (C. A. 9); *Schwartz v. U. S.*, 160 F. (2d) 718, 721 (C.C.A. 9).)

Where proof of a scheme or plan is logically relevant it may equally be shown by the defense. In this case both Tsuneishi and Mitsushio denied that any threats of death

were made to any one at Radio Tokyo. (*Tsuneishi*, V-364: 2-16, 366:18-22, 324:3-9; VI-448:4-11; VII-460:14-21; *Mitsushio*, XII-1110:22-25.)

Existence of a general system on the part of the Japanese military would help the jury to resolve this conflict in specific instances. Exhibit W for identification, in particular (orders to Wake Island prisoners, XXXVII-4184) was the only piece of *documentary* evidence offered on the issue by either side. It squarely corroborates the defense witnesses. Such evidence is therefore just as relevant when offered by the defense here, as it is when offered by the prosecution to prove plan or system.

Fourth. Gillars v. U. S., C.A. D.C. No. 10187, slip opinion, pages 12-13, holds all duress on others inadmissible, but cites no authorities. None of the above grounds for admitting such evidence are even considered. We submit the opinion is so scant upon the subject that it cannot be treated as authority. A case is not authority upon points lurking in the record but not expressly discussed. (*U. S. v. Mitchell*, 271 U.S. 9, 14; *Webster v. Fall*, 266 U.S. 507, 511.)

d. Evidence of state of terror pervading entire Radio Tokio staff.

Evidence that the entire broadcasting staff at Radio Tokyo was kept in a state of fear after November, 1943, is certainly material as to defendant, who worked there. It was plain error to exclude the last answer of witness Hayakawa, which dealt with this situation. (R. 395-6.)

7. All this restriction of the defense of duress was plainly prejudicial. As stated before the prosecution witnesses testified *that they ordered defendant to make the alleged broadcast which constitutes Overt Act 6* (*Mitsu-*

shio, XI-971:13-18, 974:17-976:11.) The errors recited therefore touch the very incident on which the conviction rests.

8. SUMMARY.

The Court's instructions and rulings on evidence deprived defendant of virtually all her defense of duress. Much evidence was excluded which was plainly relevant—notably reports of atrocities communicated to defendant and suggestions of mob violence against defendant herself.

The instructions completely disregarded the fact that defendant was wholly in the power of a hostile government, and that the duress directed against her was governmental duress. Moreover, they did not even give her the full benefit of the rule governing duress by private persons in peacetime.

The Court's handling of this issue alone requires reversal of the judgment.

B. THE GENEVA CONVENTION.

The defense of the Geneva Convention (47 U. S. Stats. at L. 2021) is the counterpart to the defense of duress. Defendant could not call upon the United States for protection, and the defense of duress is based partly upon that circumstance. The Geneva Convention is an attempt to give prisoners of war protection, not directly from the countries to which they owe allegiance, but through international agreement. Defendant requested instructions based on the theory that the Geneva Convention applies to her, at least vis à vis the United States Government. (Requests Nos. 39, 106-137, R. 298-308.)

The gist of these requests is that prisoners are subject to the laws of the detaining power (Art. 45—request 117; R. 301-2); that belligerents may utilize the labor of prisoners of war according to their rank and aptitude (Art. 27—request 118, R. 302); that no prisoner shall be employed at labors for which he is physically unfit (Art. 29—request 121, R. 303) and *most important* that “Labor furnished by prisoners of war shall have no *direct* relation with war operations”. (Art. 31—request 120, R. 302-3.)

The defendant’s position was summed up in request 127, R. 305, that “work which had a *direct* relation with war operations” was the *only* work which she could not legally perform. (See also request 126, R. 305.)

Obviously, the fundamental question is whether the Geneva Convention applies to the defendant. But this question itself depends partly upon the force of a treaty as between a government and its own citizens. We shall therefore discuss the latter question first.

1. OPERATION OF TREATY AS BETWEEN THE GOVERNMENT AND ITS OWN CITIZENS.

For purposes of this discussion, we accept the government’s current contention that the defendant is a citizen of the United States.

a. The Constitution puts treaties and acts of Congress on the same footing as the law of the United States:

Art. VI, cl. 2:

“This Constitution and the laws which shall be made in pursuance thereof and all treaties made under the authority of the United States shall be the supreme law of the land.”

So in addition to its international aspects, a treaty fixes rights and obligations *as between the United States Government and its citizens*, exactly like an Act of Congress.

b. Treaties are to receive a liberal construction. It has been held that they are to be construed more liberally than private agreements. *Choctaw Nation v. United States*, 318 U.S. 423, 431.

c. *As between the United States and its own citizens*, rights under a treaty may be claimed by private citizens. This follows necessarily from the provision that a treaty is "the supreme law of the land" in the same manner as an act of Congress. The note in *Johnson v. Eisentrager*, 94 L. Ed. Adv. Ops. 814, 829, n. 14, that rights under the Geneva Convention are vindicated only through protests of the protecting power, refers to matters *between the Government of one country and the citizens of another*.

2. APPLICABILITY OF GENEVA CONVENTION TO DEFENDANT.

As indicated above, the Geneva Convention is included in the United States Statutes at Large. (47 Stats. 2021.) *In re Yamashita*, 327 U.S. 1, 23 says that the United States and Japan were signatories to the Convention. The dissenting opinion of Justice Rutledge asserts that the Convention was never ratified by Japan. (327 U.S. 1, 72, n. 36.) But after outbreak of the war, the United States and Japan exchanged diplomatic notes, by which they agreed (1) that both of them were bound by the Geneva Convention and (2) that its terms should apply to *interned civilians* as well as to military prisoners. This is Defendant's Exhibit BU for Identification (L-5595) which was rejected by the trial Court. (The exhibit consists of photo-

stats of identical documents which were *admitted* in *Kawakita v. U. S.*, No. 12061.)

The legal question is the same as if the Exhibit had been received in evidence—whether the Geneva Convention likewise governs *uninterned* civilians. This question must be answered affirmatively both in general and specifically as between the United States and its own citizens.

a. The Geneva Convention applies generally to uninterned civilians.

Defendant was entitled to instructions on the theory that the Geneva Convention applies to uninterned as well as to interned civilians. This is true first because it is the correct construction of the Convention under the rule of broad construction, *supra*, and in view of the fact that the *legal* position of interned and uninterned civilians is *identical*; *second*, because the record contains evidence that the Japanese in fact placed defendant on the same footing as a prisoner of war.

(1) The legal position of interned and uninterned civilians is identical.

A belligerent has the right to intern all individual alien enemies. Any degree of freedom which it allows them is purely a matter of grace. Compare *Johnson v. Eisentrager*, 94 L. Ed. Adv. Ops. 814, 822, n. 6, quoting *Citizens Prot. League v. Clark*, 155 F. (2) 290, 293:

“‘At common law “alien enemies have no rights, no privileges, unless by the King’s special favor, during the time of war” [Blackstone-372, 373]’.”

Rex v. Vine St. Police Station [1916] 1 K.B. 268, 278-9:

“At common law an alien enemy had no rights (case) and he could be seized and imprisoned and

could have no advantage of the law of England. This position, however, has been softened by custom and by decision of the Courts * * * He is therefore in a similar position to an alien enemy resident here under license from the Crown. *That license, however, can be terminated at any time by the Crown * * **

Similarly, the provisions of the Alien Enemy Act (50 U.S.C. 21ff) are that alien enemies may be interned upon the issuance of an executive order. Legally, therefore, interned and uninterned enemy aliens are equally much at the mercy of the government of the country in which they reside.

This being so, they are included within the spirit and intention of any international agreement which seeks to protect the nationals of one belligerent in the territory of its opponent. Under the rule that treaties must be broadly construed, the Geneva Convention, with its subsequent enlargement through Exhibit BU for identification, must be construed as covering uninterned civilians like defendant.

(2) The Japanese put defendant in same class as prisoners of war.

Cousens testified that when he was taken to the prison camp at Mergui, Burma, he was told "that we were prisoners of war of the Imperial Japanese Army. We had no rights". (Cousens, XXVIII-3122:14-16.) Likewise at his first interview before Tsuneishi. (Cousens, XXIX-3235:25-3236:1.) When Takano ordered the defendant to broadcast *he told her exactly the same thing.*

Cousens, XXVIII-3184:21-4:

"I recall that she said, as part of the conversation, that she had been told the old familiar phrase that

we have been told, *that she was a foreigner that she had no rights* and that she had to obey”.

This shows that the *Japanese classified the defendant the same as a prisoner of war*. If the Japanese put her in a prisoner of war category, they could not be heard to say that she was not protected by the Geneva Convention. And certainly no other signatory would want to deny her its protection.

3. APPLICABILITY OF GENEVA CONVENTION TO DEFENDANT AS BETWEEN HERSELF AND THE UNITED STATES GOVERNMENT.

As between the United States and its own citizens there are even more cogent reasons for holding the Geneva Convention applicable to persons in defendant's position. For as between the United States and its citizens, the convention prescribes what American citizens may and may not do while residing in an enemy country. It is in effect an exegesis on the treason statute. (18 U.S.C. 1.) For when the United States signs a treaty saying that the detaining power may utilize the labor of war prisoners (Arts. 27, 29) and shall be obligated to pay for same (Arts. 28, 34), the United States certainly is not going to punish its citizens for treason for doing the work which it has agreed the detaining power may demand. And when it specifies that prisoners shall not be used for work having “direct relation with war operations”, it is in effect approving their use for work having only *indirect* relation with war operations. Conceivably, this might give aid and comfort to the enemy. But here again, the United States obviously does not intend to punish its prisoners for treason for obeying orders which it has agreed that the detaining belligerent may lawfully give.

And if it does not punish its prisoners or interned civilians for treason under these circumstances, there is no logic in imposing that penalty on *uninterned* civilians, *who are otherwise in exactly the same position. The fact that they are not interned is a matter of grace or accident—they are just as much subject to the coercion of the detaining power.* (Compare Okada's testimony, R. 785, that the Japanese government did not intern the Nisei, Chinese or Manchurians in Japan because they were so numerous that it was impracticable. The defendant testified that she repeatedly asked for internment and was refused, being told she was a woman and, therefore, probably could not do much harm. Defendant, XLV-4966:13-22.)

The sum and substance is that the Geneva Convention marks the *adoption of a new policy* governing the acts of aliens in an enemy country. And it is a settled rule of construction that *a statute which initiates a policy must be construed to cover all who fall within the scope of the policy.* See *Van Beeck v. Sabine Towing Co.*, 300 U.S. 342, 344:

(See Appendix p. 18.)

Viewed from this standpoint, the Geneva Convention and its extension in Exhibit BU for Identification, applies to persons like defendant, who are caught in an enemy country and only happen not to be interned.

4. DEFENDANT'S PROPOSED INSTRUCTIONS CORRECTLY SUBMITTED LAW UNDER GENEVA CONVENTION AND ERRONEOUSLY WERE REJECTED.

The substance of defendant's proposed instructions under the Geneva Convention was *first*, that as a statute

of the United States it had to be read together with 18 U.S.C. 1. (Request No. 106, R. 299, quoting Constitution Art. VI cl. 2; requests 125, 126, R. 304-5, as between the United States and its citizens the Geneva Convention legalizes all acts by United States citizens in enemy territory which it does not forbid.) *Second*, that the convention permitted the detaining power to use prisoners even for work *indirectly* related to the war effort (since it generally permitted the detaining power to use the labor of war prisoners and forbade only labor having a *direct* relation with war operations; requests, 118, 120, set forth at R. 302). *Third*, defendant's requests submitted as a *question of fact to the jury* whether defendants broadcasting was *directly* or *indirectly* related with war operations. (Requests 127-129, 132, R. 305-7.) Another group of requests presented the alternative proposition that defendant's broadcasts *as a matter of law* had *no direct* relation with war operations. (Requests 131, 133, 136, R. 306-8.)

The general applicability of the Geneva Convention was summed up in Request 115, R. 301, which we submit states the correct law (even though it should perhaps have been covered by a flat instruction that defendant was within the purview of the convention).

(No. 115, R. 301) "Where the United States by treaty has consented that its military prisoners of war may do certain kinds of work while under the power of an enemy nation and American civilians are in the enemy country at the outbreak of war with the United States, the United States does not punish its civilian citizens for treason for doing exactly the same thing which it has permitted to its military prisoners."

Once the Geneva Convention is held applicable, the theory of the above instructions is clearly correct. Since the Geneva Convention forbids only work having a direct relation with the war effort, the question for the jury to decide is whether the defendant's work bore such relation. If there is evidence on each side of the question the jury should have been allowed to pass upon it. Otherwise the defendant was entitled to peremptory instructions in her favor.

5. SUMMARY.

Defendant, though uninterned, was legally in exactly the same position as American civilians interned in Japan. The Japanese could intern her whenever they wished. *She was subject to exactly the same coercion. It does not make sense that she should be guilty of treason for precisely the same acts which the Geneva Convention legalizes for interned civilians.*

In view of this fact, together with the rules that treaties are broadly construed and that statutes initiating policy are construed to cover all cases logically included within the policy, the Geneva Convention must be held applicable to persons in defendant's situation. She could legally be ordered to do any work which did not have "*direct relation with war operations*". The Court should have submitted to the jury the question whether her broadcasts had a *direct* or only an *indirect* relation with war operations.

C. ERRORS RESPECTING OVERT ACT 6.

Several errors were committed bearing directly on Overt Act 6 (on which defendant was convicted). *First,*

the Court gave an incorrect instruction; *second*, the prosecutor twice misstated the evidence in his argument to the jury. Two improper questions which the Court allowed on this topic will be discussed under "cross-examination of the defendant". We first recapitulate the evidence on Overt Act 6. Oki and Mitsushio testified that in October, 1944, after news of the battle of Leyte Gulf, the defendant broadcast the words "Now you fellows have lost all your ships. You really are orphans of the Pacific. Now how do you think you will ever get home?" (*Oki*, IX-682:16-18; see also, *Mitsushio*, XI-974:1-3.)

Nakamura testified to an alleged similar incident occurring sometime *in the fall* of 1944. He specifically said that he could not fix the time any closer. (*Nakamura*, XXI-2295:9-13.) His version of the words was, " 'This is Orphan Ann saying hello to all you boneheads in the Pacific. Now, you have lost so many ships, how are you going to find your way back home'. Or something to that effect'".

The defendant denied any such broadcast. She said the closest thing to it that ever occurred was when after the Battle of Formosa, *Oki suggested to Reyes* that such a broadcast be made. But the suggestion was not to her, nor did she make such a broadcast. (Defendant, XLIX-5512:6-5514:9; see also Defendant, XLVI-5122:6-5123:4; XLVII-5302:23-5303:14.)

Clarke Lee testified that she told him she had made such a broadcast after the Battle of Formosa. (*Lee*, VII-485:3-486:6.)

Although the defendant denied Overt Act 6, she is entitled to have the prosecution's evidence on the subject correctly submitted. Cf. *Lee v. Mississippi*, 332 U.S. 742

(mode of taking alleged confession is in issue even where defendant denies making any); *People v. Keel*, 91 Cal. App. 599, 267 Pac. 161 (defendant entitled to instruction on self-defense where supported by other evidence, though he himself denies stabbing).

Because defendant had no previous knowledge of the specific acts charged in Overt Act 6, her own testimony was her principal defense on that charge. The Court had denied a motion for a bill of particulars before the trial. (Motion, par. 16, R. 99, 106-7, Order, R. 115.) The only witnesses besides defendant were those who gave general negative testimony that they had never heard such broadcast (supra, pp. 28-9); Duane Mosier, who said he heard a *man announcer* discuss the Leyte Gulf battle after defendant's program on *November 5 or 6, 1944* (Mosier, XL-4474:12-4475:19) and Charles Sexton, Jr., who said that while he was en route to Leyte on *December 3 or 4, 1944*, at about *2 or 3 P.M.*, he heard the bombardment of Leyte mentioned over the Japanese radio by a woman with a slight oriental accent, not the defendant. (Sexton, XL-4484:12-4486:25.) He had met defendant. (Sexton, XL-4488:25-4489:1.)

This sham of a "treason" trial, as conceived by the government, was a novel one to say the least. The defendant was left in complete ignorance of the real nature of the accusation against her. She was blocked by the denial of a bill of particulars from learning the nature of the accusation. The want of a list of the prosecution's witnesses in Japan prevented her counsel from conducting a full and complete investigation concerning those witnesses and the evidence the prosecution expected to ad-

duce from them. Apparently, it is not necessary to notify an accused of the real nature of an accusation for this might enable the accused in a "sensational" case to prepare and present a defense. Evidently it is inexpedient, from the prosecution's viewpoint, to allow a defense to be made when the Administration, under the pseudonym of "Government", is bent upon prosecuting a policy case.

1. PREJUDICIAL INSTRUCTION ON OVERT ACT 6.

After quoting that part of the indictment which referred to Overt Act 6, the Court went on to say,

LIV-5955:13-15 "The witnesses who testified regarding the commission of Overt Act No. 6 were George Mitsushio, Kenkichi Oki, and Satoshi Nakamura".

Defendant excepted to this part of the instruction on the ground that it should have been left to the jury whether Nakamura testified to this same act or to some other occurrence. LIII-5930:19-21; see also LIII-5931:4-6. This objection turns on the fact that while the indictment (R. 6), Oki and Mitsushio placed Overt Act 6 in *October*, 1944, Nakamura testified generally to something "*in the fall*".

Since the "fall of 1944" covers more than merely the month of October, it is obvious that Nakamura *might or might not* have been referring to the same alleged incident as Oki and Mitsushio. This doubt is emphasized by Nakamura's different version. Before the jury could accept Nakamura as a corroborating witness, they had to decide the preliminary question whether he was testifying to the same incident—"the same Overt Act".

But the Court did not allow them to pass upon that preliminary question. Instead it instructed them peremptorily that Nakamura was a witness to Overt Act No. 6 (see quoted instruction *supra*, p. 132). Such peremptory instruction regarding evidence which could reasonably be taken in two different ways was error under the principle of cases like *Gardner v. Babcock*, 70 U.S. 240, where this Court said

(p. 244) "the court could not tell the jury that any legal result followed from evidence which *only tended* to prove the issue to be tried".

Other authorities to the same effect are:

7 *Cyclopedia of Federal Procedure* (2d Ed.), Section 3375, p. 624.

"Facts in issue and material must not be assumed as true, if there is any evidence on which the jury might find the contrary. The instruction, therefore, should not declare a presumption of fact which is for the jury to draw."

Weightman v. Corporation of Washington (1861), 66 U.S. 39, 17 L. Ed. 52, 57.

"* * * Where there is evidence tending to prove the entire issue it is not competent for the court, although the evidence may be conflicting, to give an instruction which shall take from the jury the right of weighing the evidence and determining its force and effect, for the reason that, by all the authorities, they are the judges of the credibility of the witnesses and the force and effect of the testimony."

53 *Am. Jur.* 478, note, col. 1;

Wesley v. State (1859), 37 Miss. 327, 75 *Am. Dec.* 62, 67;

People v. Strong (1866), 30 Cal. 151, 158;

People v. Buster (1879), 53 Cal. 612, 613;

Cf. *State v. Truskett*, 85 Kan. 804, 118 Pac. 1047, 1051, col. 2.

Since Nakamura's testimony could be construed as referring either to the same or a different incident as that mentioned by Oki and Mitsushio, it was error flatly to tell the jury that Nakamura was testifying to the same event. Going directly to the overt act on which defendant was convicted, the error was prejudicial. That is especially true in view of the fact that the jury acquitted on Overt Act 5—the preparation of script for the same broadcast, but which was supported by the testimony of Oki and Mitsushio alone. (*Oki*, IX-677:21-681:11; *Mitsushio*, XI-968:16-974:15.) The additional witnesses evidently made the difference between acquittal on Overt Act 5 and conviction on Overt Act 6. The jury had once reported inability to agree. (LIV-6009:12-13.) It cannot be said that the above error did not tip the scales in favor of the prosecution.

2. MISCONDUCT OF PROSECUTOR.

The prosecutor twice misstated the evidence respecting Overt Act 6 in his arguemnt to the jury. *The record affirmatively shows that the jury were influenced by this misstatement.*

At II Arg. 303-5, the prosecutor talked about Overt Act 6. He said, among other things:

II Arg. 303:14-20: "That was in October 1944. Overt act 6. She unhesitatingly, unequivocally, denies broadcasting those words or anything like it.

Well, you can understand why she refuses to admit the voicing of that broadcast. *The government has produced not two witnesses, but five, who contradict her testimony. Mitsushio, George Mitsushio, Kenkichi Oki, Satoshi Nakamura, Clark Lee and Richard Henschel.*”

At II Arg. 329:2-5 the prosecutor said again:

“Now this testimony from *five witnesses* that the defendant broadcast the incident about *American ship losses after Leyte Gulf*, concerning which five government witnesses testified * * *

Defendant assigned the statements on pages 303-5 as misconduct and asked that the jury be instructed to disregard them. (LIV-5940:3-8.) We made no separate assignment as to the statement on II Arg. 329, which came later. The judge gave no admonition but simply threw the matter back into the laps of the jury. (LIV-3940:9-10.) It will be remembered that Oki and Mitsushio (as well as Nakamura) testified that Overt Act 6 was made in connection with the *Battle of Leyte Gulf*. The prosecutor correctly quotes Clark Lee's testimony that he interviewed defendant relative to a broadcast in connection with the so-called “*Battle of Formosa*”. This is evidently *not* “*the same overt act*”. But the very fact that the prosecutor names Clark Lee as a *fifth witness* to Overt Act 6 amounts to saying that Lee *did testify to the same overt act* as Oki and Mitsushio. Any doubt upon the subject is dispelled by the quotation from page 329—that *five witnesses* testified “that the defendant broadcast the incident about American ship losses *after Leyte Gulf*”. This is a clear implication that Clark Lee testified that the defendant told him about a supposed broadcast in

connection with the Leyte Gulf battle. *As such it is a barefaced misstatement of the record.* Authorities (cited below) have often held that Courts will infer prejudice from this type of misconduct. In the present case the conclusion need not be rested on inferences—we have the rare phenomenon of an affirmative expression of what the jury were thinking during their deliberations. Both sides had stipulated to send transcripts of the testimony into the jury room on request. (LIV-6001:12-6002:4.) One of the requests for transcripts was worded as follows:

(LIV-6001:5-8) “Would it be possible for the jury to examine in the jury room the transcripts of the testimony of the following relative to overt acts 5 and 6:

“Clark Lee, Oki, Mitsushio”.

This request shows that the jury accepted the prosecutor's misstatement that Clark Lee testified to the same overt act as Oki and Mitsushio.

It is hardly possible to have stronger proof that the prosecutor's misconduct was prejudicial.

But even this is emphasized by the facts that the jury were out *four days* (from 11:45 A.M., September 26, LIV-5942, 5995:8-9, to 6:04 P.M., September 29, LIV-6013:12, 6016:10-11) and by the fact that at the end of the second day they reported themselves unable to agree. (LIV-6009:12-13.) It is further emphasized by the argument that Henschel was a fifth witness to Overt Act 6. Henschel claimed that he heard the defendant's voice over the radio somewhere between 9 and 11 P.M. Philippine time. (*Henschel*, XXVI-2960:25, 2988:14-16.) 9-11 P.M. Philippine time was 10-12 P.M. Tokyo time. It is obviously

absurd to say that a witness who testified he heard the defendant between 10 P.M. and midnight corroborates the same overt act described by another witness who says he heard her between 6 and 7 P.M. The fact that the prosecution felt forced to make such a ridiculous argument discloses the weakness of their case.

Under these circumstances the prosecution's misrepresentation of Clark Lee's testimony is in itself reversible error. It is well settled that statements in argument which are outside or contrary to the record require a reversal. *Berger v. U. S.*, 295 U.S. 78, 84 (misstatement of evidence in questions); *Taliaferro v. U. S.*, 47 F. (2d) 699 (statement outside of record); followed in *Minker v. U. S.*, 85 F. (2d) 425, 426-7 (C.C.A. 3); *Beck v. U. S.*, 33 F. (2d) 107, 114; *U. S. v. Nettl*, 121 F. (2d) 927, 930. In *Pierce v. U. S.*, 86 F. (2d) 949, 953, it was said, "that it was intended to prejudice the jury is sufficient ground for a conclusion that in fact it did so".

The judge's statement that the jury were the judges of the evidence, is of course no instruction to disregard. Cf. *Taliaferro v. U. S.*, 47 F. (2d) 699, 701, where it is said that the trial judge cannot be expected to have all the evidence in mind, but that a judgment will be reversed where the defendant makes the proper assignment and request, and the trial judge fails to rule on it; also *People v. Sanchez*, 35 A.C. 565, 572-3, where the Supreme Court of California recently discussed inadequate instructions to disregard misconduct.

The misstatement of evidence respecting Overt Act 6 was therefore unquestionably prejudicial. The jury showed affirmatively that they accepted the misstatement; they

convicted on Overt Act 6 alone; they had difficulty in reaching any verdict. The foregoing misconduct in itself requires that the judgment be reversed.

D. CONFESSIONS OF DEFENDANT.

The prosecution introduced several confessions of the defendant. All, we submit, were inadmissible. These confessions fall into four classes: (1) Exhibit 24, a long statement taken by agent Tillman of the F.B.I.; (2) Exhibit 15, Clark Lee's notes of an interview with defendant, which she later signed in the presence of J. B. Hogan of the Justice Department and Harry Brundidge; (3) Exhibit 2, a piece of Japanese paper money with the defendant's signature and the words "Tokyo Rose" in her handwriting; (4) the oral confessions.

1. EXHIBIT 24.

a. Exhibit 24 was taken by F.B.I. agent Tillman on April 30, 1946 (it was introduced at XIV-1457). At that time defendant had been incarcerated continually since October 17, 1945. (See statement of facts in part I-B of this brief, giving transcript references on her imprisonment.) She had been in the custody of the army from October 17, 1945, to April 29, 1946. On April 29, 1946, she was turned over by the army to the Department of Justice, *for purpose of interrogation by agent Tillman.* (Def. Exh. O, XV-1586.)

A confession taken under these circumstances is inadmissible under the rule of *McNabb v. U. S.*, 318 U.S. 332 and *Upshaw v. U. S.*, 335 U.S. 410. This is true both be-

cause those cases forbid taking a confession after such long incarceration, and because they forbid holding a defendant *for purposes* of investigation. (*Upshaw v. U. S.*, 335 U.S. 410, 414.) *U. S. v. Haupt*, 136 F. (2d) 661, 666-71 (C.C.A. 7), a treason case, was reversed for violation of the *McNabb* rule. The Court held that point alone sufficient to require a reversal. (136 F. (2d) 661, 671, col. 1, ft.)

So far as the long confinement is concerned, it is immaterial that the detention before April 30, 1946, was by the military authorities rather than the Department of Justice. The army is just as much a branch of the government as is the Justice Department. Furthermore, the military authorities are under the same requirement to give a speedy trial as are the civil authorities. See 10 U.S.C. 1542, which provides *inter alia*:

“Where any person subject to military law is placed in arrest or confinement *immediate steps* will be taken to try the person accused or to dismiss the charge and release him.”

The identical provision was contained in the section before the 1948 amendment. (See first sentence of par. 4 of old section 1542.)

The situation is therefore the same for confinement by the military and the civil authorities. The logic of the *McNabb* decision applies equally in either case.

On the motion for bail, the government argued that there were no United States Courts in Japan. But that is beside the point. *The detention in 1945-6 was not for the purpose of taking her before a court in the United States. She was arrested in Japan and released in Japan.*

The absence of United States Courts in Japan would probably justify the detention necessary to bring defendant before a Court in the United States. But it does not justify holding her indefinitely in Japan with no move to bring her before any Court; nor does it justify holding her "for interrogation".

Under the rule of *McNabb v. U.S.*, 318 U.S. 332, *Upshaw v. U.S.*, 335 U.S. 410, and *U.S. v. Haupt*, 136 F. (2d) 661, the admission of Exhibit 24 was error.

b. Even apart from *McNabb v. U.S.*, 318 U.S. 332, and *Upshaw v. U.S.*, 335 U.S. 410, the admission of Exhibit 24 was error because the government made no attempt to lay a preliminary foundation of voluntariness. We discuss the law on this question in connection with the other confessions, *infra*.

c. Admission of Exhibit 24, was in itself prejudicial. The authorities hold that an improperly admitted confession will be treated as prejudicial without more. *McNabb v. U.S.*, *supra*, *Upshaw v. U.S.*, *supra*, and especially the *Haupt* case, 136 F. (2d) 661, 666-71, *supra*. It has been held expressly that the partially exculpatory character of the statement makes no difference. (*Bram v. U.S.*, 168 U.S. 532, 541, followed on this point in *Ashcraft v. Tennessee*, 327 U.S. 274, 278.)

But the prosecution made plenty of use of Exhibit 24, in cross-examining the defendant. The cross-examination is based upon this exhibit at the following parts of the record: XLVIII-5325-8, 5335-7, XLIX-5457 (dealing with the subjects of the Japanese purpose of the Zero Hour, duress, and double meanings in the scripts). Admission of Exhibit 24 requires a new trial.

2. EXHIBIT 15.

Exhibit 15 (admitted at VIII-615) was Clark Lee's notes of an interview with defendant, which defendant was later induced to sign by J. B. Hogan of the Justice Department and one Harry Brundidge.

It was inadmissible on three grounds:

(a) The government failed to lay a preliminary foundation of voluntariness; (b) the record shows without contradiction that it was in fact secured both by inducement and coercion; (c) the record shows that the exhibit violates the rule of *Upshaw v. U.S.*, 335 U.S. 410, because the defendant signed it when she was under arrest *for the purpose of getting her signature*. We take these grounds in order.

a. The Government failed to lay a preliminary foundation of voluntariness.

(1) The signing of Exhibit 15 is related by John B. Hogan at VIII-609-615. He gives no testimony one way or the other as to whether any inducements were offered to defendant, whether she was instructed regarding her right to counsel or her right not to sign the document.

There is a question on coercion. (VIII-613:13-17.) The witness says that defendant "was brought into General Headquarters from her home by the Army at my request" (VIII-610:15-16) and that he "dared" the defendant to sign the document (VIII-611:25-612:1):

"I then asked her if she would dare to sign it and she said she would."

In short, the prosecution made no attempt to show that the defendant signed freely and voluntarily without *either*

inducement or coercion. The circuits are in conflict as to whether the government must make preliminary proof of voluntariness before introducing a confession. The Supreme Court has said by dictum that the *prosecution must show* that the confession was voluntary. See *Mangum v. U. S.*, 289 F. 213, 215 (C.C.A. 9—before admitting confession trial Court must determine, as a preliminary question whether free and voluntary); *Litkofsky v. U. S.*, 9 F. (2d) 877, 882 (C.C.A. 3—government has burden of proving voluntariness); *Hartzell v. U. S.*, 72 F. (2d) 569, 577 (C.C.A. 8—no preliminary proof needed, citing *Gray v. U. S.*, 9 F. (2d) 337, C.C.A. 9); *Ah Fook Chang v. U. S.*, 91 F. (2d) 805, 809 (confession presumed voluntary). The *Litkofsky* and *Ah Fook Chang* cases cite *Wilson v. U. S.*, 162 U.S. 613, 622, for opposite conclusions.

The language of the Supreme Court is as follows:

Bram v. U. S., 168 U.S. 532, 549:

“The rule is not that in order to render a statement admissible *the proof* must be adequate to establish that the particular communications contained in a statement were voluntarily made, but it *must be sufficient to establish that the making of the statement was voluntary.*”

This clearly implies that the government has the *preliminary burden of proof* to show that a confession was voluntary.

Compare also *Hopt v. Utah*, 110 U.S. 574, 587; and see 3 *Wigmore on Evidence* (3d ed.) sec. 860 for the five rules which exist on this point in different jurisdictions.

- b. **The record shows without contradiction that Exhibit 15 was obtained both by inducements and coercion.**

The taking of Exhibit 15 has two phases. First is the original interview with Clark Lee in 1945 at which Lee took notes; second is the *signing* of his notes by defendant in 1948. Neither one was voluntary. We shall consider the signing first.

- (1) **Uncontradicted evidence shows defendant was offered inducements to sign Exhibit 15.**

In March, 1948, J. B. Hogan of the Department of Justice went to Japan to get defendant to sign Clark Lee's notes (*Hogan*, VIII-609:13-15, 620:5-12). Harry Brundidge went with him, having offered his services to the Department of Justice. The Government paid Brundidge's plane fare to Tokyo (*Hogan*, VIII-619:4-19; 630:18-631:5). Hogan, Brundidge, defendant and a receptionist were together in a room when Hogan "dared" defendant to sign the notes (*Hogan*, VIII-610:17-20; 611:25-612:1). Hogan says he does not know what passed between Brundidge and the defendant at that time. (*Hogan*, VIII-632:2-5, 634:15-20; L-5578:3-5.) Brundidge was on the government's witness list (Exhibit 1, I-33) *but was not called. This leaves defendant as the sole witness to what transpired between herself and Brundidge relative to the signing of Exhibit 15.*

Defendant testified, XLVII-5220:22-25,

"Mr. Brundidge leaned over and told me I would be doing myself a good deed by signing this interview. 'If it is the interview given to Clark Lee,' he said, 'it would aid you in getting back to the United States,' and so I signed it."

This is a clear inducement, undenied by the prosecution, though the prosecution had an opportunity to deny it, if it was untrue.

In addition to Hogan's testimony that the Government paid Brundidge's fare to Tokyo, the defense offered Brundidge's travel orders and passport (Exhibits for Identification, BQ and BR, L-5580) to show that Brundidge was then an agent of the Department of Justice, but the Court rejected them. This we submit, was error (see below, p. 207). But, in any event, Brundidge's inducement was enough to invalidate the signing of Exhibit 15. All three were in the same room. *Bram v. U. S.*, 168 U.S. 532, 559, expressly left the question open whether inducements by persons not in authority invalidated a confession. The recent case of *Lustig v. U. S.*, 338 U.S. 74, indicates that federal officers cannot separate their acts from those of their temporary aides. There the actions of *state officers* were involved in a search and seizure; certainly the same rule must apply to one who accompanies the Department of Justice agent at government expense, and talks to the defendant in the same room when the confession is signed.

Since the evidence is uncontradicted that the signature to Exhibit 15 was obtained by inducement, the exhibit should have been excluded.

(2) Defendant under coercion at original interview.

Clark Lee described the original interview at which he took the notes which constitute Exhibit 15. He and Brundidge interviewed defendant together, right after the surrender of Japan. (*Lee*, VII-478:14-20, 479:8-11.) Both Lee and Brundidge were in uniform. (*Lee*, VII-490:25-491:6;

492:22-24.) *Lee was armed with a 45 revolver. (Lee, VII-492:16-21.) In the hotel room when he interviewed defendant, he either hung it in the closet or put it on the table. (Lee, VII-516:15-20.) He locked the door of the room during the questioning. (Lee, VII-531:8-21.)*

Defendant was not advised of her legal rights, or of the consequences of her statement, but *after the interview*, the newspaper correspondents told her she ought to get an attorney. (Lee, VII-520:23-521:20.)

We submit that any interview taken by armed soldiers after locking defendant in the room with them is not "free and voluntary". For this added reason Exhibit 15 was inadmissible.

- c. **Exhibit 15 violates the rule of Upshaw v. U.S., 335 U.S. 410, in that defendant was arrested illegally for the purpose of getting her signature.**

Hogan testified that when he wanted defendant's signature *he had members of the army bring her from her home to General Headquarters for that purpose. This was done without any warrant.*

See *Hogan*, VIII-610:13-16, and VIII-621:15-21,

"Q. You had requested some military authorities to send for her, isn't that correct?

A. Yes.

Q. Of whom did you make that request?

A. I made it to the same officer, the director of the civil intelligence section to a junior officer who had been assigned for liason man for me."

VIII-623:2-7:

"Q. In other words, the defendant was fetched to the room in the Dai Ichi Building by the army authorities?

A. Yes, in an army vehicle.

Q. She was brought there on a specific request of yours made to the army?

A. Yes."

VIII-627:18-21:

"Q. No process was issued for the arrest of defendant at that time save and except your oral request addressed to the personnel director of that army headquarters?

A. That's correct."

This shows that, in effect, the defendant was arrested and brought from her home to General Headquarters to secure her signature. And the arrest was without warrant—wholly illegal.

Upshaw v. U. S., 335 U.S. 410, holds that a confession is illegal if taken *while the defendant is held for investigation*. That is precisely what happened when defendant signed Exhibit 15. It is for that reason inadmissible.

d. The prejudicial effect of admitting Exhibit 15 is governed by the same principles as Exhibit 24. Exhibit 15 was used in cross-examining the defendant at XLIX-5401, and 5408. The U. S. attorney read at length from it in his argument to the jury. I Arg. 22:13-28:5.

e. *Summary*. Exhibit 15 was secured by the inducement of telling defendant that she had a better chance to get back to the United States if she signed it. Hogan had her arrested without warrant by the Army and brought to General Headquarters for the purpose of getting her signature. For both of these reasons the signed document was inadmissible. Clark Lee testified that the original in-

terview was obtained by locking defendant into a room with himself and Brundidge, both being in uniform, and Lee being armed with a .45. The government (apart from one question on coercion) made no preliminary showing that either the interview or the signature were wholly free and voluntary. For all these reasons Exhibit 15 was inadmissible. Letting it in is an error which requires reversal of the judgment.

3. EXHIBIT 2.

Exhibit 2 (I-37) is a piece of Japanese paper money signed by the defendant and having the words "Tokyo Rose" on it in her handwriting. The words "Tokyo Rose" written by defendant constitute a confession (we discuss the identification of defendant as "Tokyo Rose" *infra*).

a. In the first place the government made no preliminary proof of voluntariness. (*Eisenhart*, I-35:17-37:18.)

b. In the second place, the government's own proof showed that the signature was obtained when defendant had been in prison for *a month or six weeks*, thus violating the rule of *McNabb v. U. S.*, 318 U.S. 332. (*Eisenhart*, I-41:11-16, 42:1-12.)

c. Far from being voluntary, Exhibit 2 was obtained from defendant *by her jailer*. (*Eisenhart*, I-53:14-20.) She testified that she was badgered in jail, prevented from sleeping, her lights turned on and off, until she signed it. (Defendant XLVI-5167:11-5169:17.) The only prosecution evidence on this point was that Eisenhart said it did not happen to his knowledge. (*Eisenhart*, I-47:12-15.) She was admittedly not advised of her rights before signing. (*Eisenhart*, I-51:20-52:1.)

d. The fact that the Government opened its case with Exhibit 2 shows the importance attached to it. Admission of the exhibit was prejudicial both for this reason and under *Bram v. U. S.*, 168 U.S. 532, 541.

e. *Summary.* According to the Government's own evidence, Exhibit 2 was obtained in violation of the *McNabb* rule. According to defendant it was obtained also by specific coercion. Defendant was not advised of her rights when she signed it. The government made no attempt to lay any preliminary foundation of voluntariness. Admission of the Exhibit was prejudicial error.

4. THE ORAL CONFESSIONS.

Four soldiers testified to interviews with defendant in which she talked about her broadcasting activities. (Kramer, Keeney, Page, Fennimore.) All these interviews were induced by one sort of pressure or another. None was wholly free from inducement and coercion as required of a confession used as evidence in court. These statements were *taken* for newspaper purposes, and as newspaper material they were perhaps unobjectionable. But the prosecution chose to *use* the interviews as legal evidence. They must therefore stand the test of legal evidence or be excluded from the record.

a. Kramer.

Kramer's testimony covers two interviews and begins at XIII-1343. Two circumstances make defendant's statements to him inadmissible.

First, Kramer was uniformed and armed when he interviewed defendant. (*Kramer*, XIII-1370:15-23; 1379:19-23.)

Second, the defendant originally refused to talk to Kramer. (*Kramer*, XIII-1375:20-25.)

“Q. Was she told at that time and place that she had the right to remain silent?

A. Well, sir, she refused to talk to me at first. Yes, that was true, that I urged her to give me an interview, but I certainly said it was not necessary for her to, and therefore to remain silent was quite legal and so forth.”

Kramer “persuaded” her to talk by telling her that *she owed it to Yank Magazine* to give an interview (*Kramer*, XIII-1387:10-14):

“Q. Didn’t she state at that time and place that she felt she owed it to the Yanks Magazine to grant you an interview?

A. I stated she owed it to the magazine, and she agreed.

Q. And she gave you these interviews?

A. That’s right.”

Certainly when an armed and uniformed soldier from an invading army tells a defendant that she “owes” an interview to his paper, her acquiescence after previous objection is not “free and voluntary” under the rules of civilian criminal law.

Furthermore, the correspondents had told defendant that she better give an interview or be almost hounded to death. This phase is detailed by Keeney, *infra*, who testified to the same conversations as Kramer.

All of these facts were testified to by the government witness himself. It shows that defendant’s confession to him was not free and voluntary. (See review of law in

Bram v. U. S., 168 U.S. 532.) Admitting the confession was reversible error.

b. Keeney.

Keeney's testimony begins at XIV-1399. He went with Kramer, driving him out to the defendant's house. (*Keeney*, XIV-1401:1-2.) Since he testified to the same conversations as Kramer, his testimony is inadmissible for the same reasons. Keeney testified that both he and Kramer were armed. (*Keeney*, XIV-1408:19-1409:1.)

In addition, he gives the background of another interview which took place on September 4, 1945 (*between* the second and third interviews which Kramer and Keeney had with her). It shows still more threats brought to bear on defendant to make her talk (*Keeney*, XIV-1414:14-25):

“Q. Didn't she state she owed it to the boys to go down and tell them the history of her life?

A. No, we *told her that it would be better for her* to present herself to all the correspondents and have one interview rather than remain in seclusion at her home and *be badgered by correspondents*, or be sought out by them. We told her *she would just be badgered by correspondents* if she remained in seclusion, that it would be much easier or simpler for her to go before all of them.

Q. But you told her, you and Sergeant Kramer were from Yank Magazine?

A. Yes, we told her that.”

While this was directed particularly to the interview of September 4, it must also have affected the defendant in her interviews of September 3 and 5. A confession is inadmissible if given under the influence of pressure used

to extort another confession. (2 *Wharton's Criminal Evidence* (11th ed.), sec. 601, p. 998 ff; *U. S. v. Cooper*, Fed. Cas. No. 14864, 25 Fed. Cas. 629, 631; see also *People v. Jones*, 24 Cal. (2d) 601, 609, 150 P. (2d) 801.)

It follows that the testimony of defendant's statements, given by Keeney was just as inadmissible as that given by Kramer.

c. Page.

Page's testimony begins at XIV-1419. He came in an even more clearly official capacity than Kramer and Keeney; he was a sergeant in the Counter Intelligence Corps. (*Page*, XIV-1422:18-20.) He interviewed the defendant on September 6, 1944 (*Page*, XIV-1422:8-10)—the day after her series of interviews with Kramer, Keeney and the other army correspondents.

The pressure exerted by Kramer, Keeney and the correspondents who interviewed her on September 4th is presumed still to be operating on September 6th (see authorities *supra*). She was still in Yohohama, after having been brought there by the army newspaper men. (*Page*, XIV-1427:2-4, 1428:12-16.) Certainly if the defendant feels compelled to give her story to the army press division, she will feel equally compelled when the Counter Intelligence Corps questions her a day or two later. And, as stated in *Bram v. U. S.*, 168 U.S. 532, 549, the test is not whether the particular communication was voluntarily made, but whether the *making of the communication* was voluntary. It has been shown that defendant *originally objected*, to giving a story, and later acquiesced under pressure. *There is not one shred of evidence indicating that the same pressure was not operative on September 6.* We have a clear

case where *the making of the communication was not voluntary*.

Admission of a confession under such circumstances requires reversal of the judgment.

d. Fennimore.

Fennimore's testimony begins at XIV-1433. He was another member of the Counter Intelligence Corps. (*Fennimore*, XIV-1433:12-13.) He testified that he participated in the same interview with Page. (*Fennimore*, XIV-1433:18-20.) *Since he testifies to the same interview as Page his testimony is inadmissible for the same reasons.*

5. SUMMARY.

The judgment must be reversed because all confessions were erroneously admitted. Exhibits 24 and 2 were admitted in violation of *McNabb v. U. S.*, 318 U.S. 332—since the defendant had been imprisoned from one to six months when they were taken. Exhibit 15 was admitted in violation of *Upshaw v. U. S.*, 335 U.S. 410, because defendant had been illegally arrested for the purposes of getting her signature. In addition, the signature to Exhibit 15 was obtained by inducement and the original statement was obtained when defendant was locked in a room with armed soldiers. Exhibit 2 was obtained by coercion as were the oral confessions. Erroneous admission of one confession has been held prejudicial; erroneous admission of five unquestionably requires reversal of the judgment.

E. CROSS-EXAMINATION OF DEFENDANT.

The cross-examination of the defendant was one of the most shameful chapters of the trial. Every form of improper question, every form of misstatement was indulged in by the prosecutor. Despite objections thereto, all were meekly permitted by the Court.

Defendant was on the stand six days. Her direct testimony begins at XLIV-4909 and ends at XLVII-5235. Her redirect appears at XLIX-5500-L-5539. Her *cross-examination* begins at XLVII-5235, and ends at XLIX-5499; her *recross* (which contains the worst passage) covers ten pages—L-5539-48. In general the errors fall into the two classes already indicated: erroneous rulings by the Court and misconduct of the prosecutor in misstating the evidence. We divide the discussion accordingly.

1. ERRONEOUS RULINGS ON EVIDENCE.

a. Making defendant pass on truthfulness of other witnesses.

At XLVII-5249 is the first of a series of argumentative questions, all of an identical type. There were so many that we missed making objections to some. But in view of the Court's ultimate ruling in favor of the prosecution, this became unimportant. (Where objections to a line of questions are repeatedly overruled, it is not necessary to object to every question. *Wilson v. U.S.*, 4 F. (2d) 888, 889.)

XLVII-5248:25-5249:1:

“Q. And after you were married, you told Chiyeke Ito that you were still an American?”

XLVII-5249:6-12:

“A. I didn't tell her anything about my citizenship status.

Q. You heard her testify here that you did tell her that, didn't you?

A. Yes.

Q. She was in error, wasn't she?

A. Her recollection was wrong.

Q. Her recollection was wrong under oath . . ."

It is improper to ask one witness to pass on the truth or falsity of the testimony of another witness.

State v. Schleifer, 102 Conn. 708, 130 Atl. 184, 191; *State v. Bradley*, 134 Conn. 102, 55 Atl. (2d) 114, 120; *Williams v. State*, 17 S.W. (2d) 56, 58 (Tex. App.); *Temple v. Duran*, 121 S.W. 253, 255 (Tex. App.); Cf. *McDowell v. U.S.*, 74 Fed. 403, 407 (improper to cross-examine witness on another person's statement).

While the direct authorities on the question are scant, the point can easily be reasoned out. *Evaluation of the testimony of witnesses is the special function of the jury.* It is they who have to draw the conclusion whether each witness is correct, inaccurate or lying. It is distinctly not a subject for opinion evidence from any witness. *So when the cross-examiner asks one witness whether another witness is in error he is asking the witness to draw precisely the conclusion which the law specially commits to the jury.* A more flagrant example of "calling for the conclusion of the witness" can hardly be imagined.

We discuss, *infra*, the prejudicial effect of this type of examination. The same method is tried again at XLVII-5258:21-5259:15. Here the Court *sustained an objection*, as it did a few times afterwards. But the prosecutor kept using the same mode of interrogation and *seems to have overwhelmed the trial judge by sheer force of repetition.*

For after a while the judge reversed himself and then *overruled* objections to such questions throughout the rest of defendant's cross-examination.

At pages 5295-6 we have the following (XLVII-5295:16-18, 24-5):

"Q. All right. Didn't Mr. Hogan tell you that you did not have to make any statement?

A. No I don't recall Mr. Hogan telling me that.

* * *

Q. Will you say that he didn't make such a statement to you?

A. Yes."

XLVII-5296:6-7:

"Q. *You heard him testify he did, didn't you?*

A. I have forgotten that part of it."

At pages 5301-2 this method of questioning is *used directly in connection with Overt Act 6* (XLVII-5301:21-5302:8):

"Q. Somebody told you or suggested that you should broadcast about loss of ships, is that right?

A. Oh, no, not to me.

Q. *Not to you. Well, you heard Mr. Nakamura testify that you broadcast about the loss of ships, didn't you?*

A. *Yes, I did.*

Q. *His testimony is false, wasn't it?*

A. He said the Battle of Leyte, and I don't know anything about the Battle of Leyte.

Q. I say his testimony was false that you broadcast about the loss of ships, wasn't it?

A. *I don't know whether I am in the position of saying anybody's testimony is false."*

Defendant's last answer highlights the impropriety of asking this type of question. It also shows its prejudicial effect. The defendant is asked a question which is not for her to answer (being solely for the jury) *and so is made to look helpless and at a loss. Such an effect cannot but hurt her case in the eyes of the jury.*

At XLVIII-5321:24-5322:8:

(See Appendix p. 19.)

Note the insistent, badgering repetition of the improper question. There was more of the same on page 5340, with an embellishment in the form of misquoted testimony. XLVIII-5340:13-5341:1:

“Q. *You heard Mr. Eisenhart testify that he didn't ask you, didn't you?*

A. He didn't get it from me, Mr. DeWolfe.

Q. *Didn't you hear him testify that he did get it from you and didn't ask you for the 'Tokyo Rose' on it?*

Mr. Collins. Now just a moment, Mr. DeWolfe. There is no such testimony in this record.

Mr. DeWolfe. There is such testimony in this record.

Mr. Collins. There is no such testimony in the record.

Mr. DeWolfe. Q. *Didn't you hear him so testify?*

A. I don't believe he said that.

Q. *You don't?*

A. I believe he said that he got it from some other soldiers who got it from me.”

Eisenhart *had*, in fact, testified that he asked another soldier to get Exhibit 2 from the defendant, not that he had gotten it himself. (*Eisenhart*, I-35:23-36:6, 52:19-53:13, 54:1-7.)

At XLVIII-5359:17-21, the Court once more *sustained* an objection to this type of question. Nevertheless *on the very next page*, the prosecutor asks the same kind of question again, and combines it with a misstatement of the record.

XLVIII-5360:4-23:

“Q. What did you get at the end?

A. Between 130 and 135.

Q. At the end in 1945?

A. That is correct.

Q. 135?

A. Yes, that is correct, at the most.

Q. How much allowance?

A. No allowance whatsoever, absolutely no allowance.

Q. *Did you hear Mr. Yamazaki testify that you got 180 yen a month?*

A. Yes, I heard him testify.

Q. *He is wrong, is he?*

A. He is wrong.

Mr. Collins. Mr. DeWolfe, if you refresh your recollection by the transcript, you will find that that was subject to a 20 or 25 per cent tax.

Mr. DeWolfe. Speak to the jury.

Mr. Collins. You should not distort the facts, at least.

The Court. Keep in mind the jury heard the facts. Let them determine what the facts are.”

Yamazaki had testified that defendant's 180 yen salary was subject to a tax of perhaps 20%. (*Yamazaki*, XXV-2797:19-2798:19.) *If 25% is deducted from 180 the remainder is 135.*

At XLVIII-5362:19-5363:23 and 5365:7-11, the prosecutor again asks this kind of question—and the judge sus-

tains an objection to it, *for the last time*. The prosecutor, nevertheless, keeps right on with the questions and the Court changes its rulings. *This new phase begins on pages 5368-9.*

XLVIII-5368:12-5369:15:

(See Appendix p. 20.)

From now on, interrogatories of this type just pour in, and the Court overrules all objections to them.

Next is the incident at pages 5370ff. (The transcript pages are out of order here: the page numbered *5381 should follow 5370.*) It is so long that we print it in the appendix. XLVIII-5369:22-5370 (all), 5381:1-25, 5371:1-5372:1. (Appendix pp. 22-4.)

Here we have more of the same hammering insistence on an improper question. And now it is with full approval of the Court (the direct question "He was in error?" was not asked here. But the questions which *were* asked were designed for the same purpose).

Next we find at XLIX-5395:25-5396:9:

(See Appendix p. 21.)

And at XLIX-5397:1-5398:2:

(See Appendix p. 21.)

The cross-examiner now has the bit in his teeth. The Court permits the improper questions, and they are pounded at the defendant in endless reiteration.

A whole series of such questions appears at XLIX-5403-5410. We print them in the appendix, pp. 24-7.

Again at XLIX-5427:24-5428:20:

"Q. Can you recall attending a party shortly prior to her marriage?

A. No.

Q. At the radio?

A. No, I didn't even know she was going to get married.

Q. *You heard Muriyama testify that you were there at that party, didn't you?*

Mr. Collins. Well, I will object to that on the ground that that is improper cross-examination of this witness on matters that have not been developed on direct examination, and on the further ground that it is an improper attempt to impeach this witness by the testimony alleged or claimed by Mr. DeWolfe to have been given at this trial by another witness.

The Court. *Objection overruled.*

Mr. DeWolfe. *Given by three witnesses.*

Mr. Collins. It wouldn't make a bit of difference. It is improper impeachment.

The Court. Let the witness answer the question. Read the question, Mr. Reporter.

(Question read.)

A. I think, yes, I think it was Muriyama that said that."

At pages 5436-7 this objectionable mode of examination is again used with direct reference to Overt Oct 6. It is interlarded with arguments by the prosecutor and capped off with a demand that the witness say whether other witnesses "are wrong". XLIX-5436:4-5437:24.

"Q. Didn't you broadcast in 1944 in substance: 'Now, you fellows have lost all your ships. You really are orphans of the Pacific. How do you think you will ever get home now?'

Mr. Collins. I object to that on the ground that question was propounded to the witness yesterday and the answer was given. It is repetitious.

The Court. The objection will be overruled. The witness may answer.

A. No.

Mr. DeWolfe. Q. *You heard Nakamura, Mitsu-shio and Oki testify you did broadcast that, didn't you?*

Mr. Collins. I object to that on the ground it is improper cross-examination of the witness on a matter not developed on direct examination; on the further ground, it is an improper attempt to impeach the witness on statements supposedly made by other persons who testified in this case.

Mr. DeWolfe. *The statement was made and testified to.*

Mr. Collins. I ask that the remark of counsel be stricken from the record and the jury admonished to disregard it. I assign it as misconduct on the part of the prosecution to make such a statement.

The Court. *The objection is overruled.* The witness may answer. Read the question.

(Question read.)

A. Yes, I believe I did.

Mr. DeWolfe. Q. *They are wrong, aren't they?*

Mr. Collins. I submit, if Your Honor please, that is an improper attempt to impeach the witness by the so-called testimony of a witness for the prosecution in this trial. Furthermore, it is improper cross-examination of this witness, and I object to it on the further ground it is calling for an opinion and conclusion of the witness.

The Court. The objection is overruled.

Mr. DeWolfe. Q. *They are wrong, aren't they?*

Mr. Collins. I will reiterate my objection to this new question propounded by counsel.

The Court. Are both sides through?

Mr. DeWolfe. Yes, sir.

The Court. Read the question.

(Question read.)

The Court. Answer.

A. You mean the three?

Mr. DeWolfe. Q. *The three wrong.*

A. *I can't say what is wrong and what is right. All I know is I did not make any broadcasts of that nature."*

Of course, the defendant "can't say what is wrong and what is right". *That is for the jury. Yet this improper method of cross-examination has the effect of making the defendant look beaten and without a satisfactory answer regarding the very broadcast which alone sustains the conviction.* As we said in discussing Overt Act 6 above, where the jury had such difficulty in reaching a verdict, errors which go directly to Overt Act 6 must be held prejudicial. That is especially true since *the above error, bad enough in itself, is cumulated to the erroneous instruction and misstatement in argument already considered,* with which we dealt before.

Another wave of such questions follows, which we likewise print in the appendix. (See Appendix pp. 27-36.)

From XLIX-5460-67 *there are eight solid pages in which this objectionable form of examination is used almost without a break.* There is so much at this juncture that we set it forth *in the appendix.* (Reference above.)

This form of error now enters a new stage. *The Court joins in and begins asking questions of the very type to which it had originally sustained objections.* (XLIX-5462: 6-7.)

At XLIX-5473-5 we again have the improper question coupled with a misstatement of the record:

XLIX-5473:20-5474:12, 5475:1-20, see appendix p. 36.

Tillitse, the Danish Minister (R. 806) had not testified that a bonus was the Japanese custom, but that it was the custom *in Japan*. (Tillitse, R. 807.)

At XLIX-5477 the objectionable question is used again. (See Appendix, p. 38.)

And once more at XLIX-5490:17-5491:14:

“Q. After November 1943 and until he was off the Zero Hour, he prepared the part of the script that you voiced into the microphone?

A. Yes.

Q. *Did you hear him testify that he never prepared any portion of the script that you were to read?*

Mr. Collins. Object to that on the ground that that is improper cross-examination of the witness upon a matter not touched upon on direct examination, on the further ground it is an attempt to impeach the witness by testimony of another witness given at this trial and on the further ground that no such testimony was elicited from the witness Ince on the stand, who identified his own handwriting on a portion of the script.

Mr. DeWolfe. *It is volume 31, page 3533 in the transcript.*

Q. Did you hear Ince so testify, that he never prepared any portion of the script which you broadcast?

Mr. Collins. I submit my objection, if your Honor please.

The Court. The objection will be overruled, the witness may answer.

A. I can't say for sure, but he did prepare part of it.

Q. You can't say whether you heard him testify that he didn't, can you?

A. I can't say for sure, no.”

Here we have another example of the insistent repetition of this kind of objectionable question. Furthermore, *the prosecutor again misstates the record*. While Ince said generally that he did not prepare defendant's scripts, he made the express exception that he "rehashed" some of Cousens' scripts when Cousens was not able to. (See Ince XXXI-3533:2-11):

(See Appendix p. 39.)

The foregoing misstatement is especially reprehensible since the above answers were extracted from Ince by the prosecutors themselves on cross-examination.

This review shows a continuous stream of the same type of improper questions—extending, all in all, over 240 pages of the record, from XLVII-5249 to XLIX-5491. Such a relentless reiteration of error is necessarily prejudicial. While the authorities cited, see page 154, *supra*, held the error nonprejudicial a different situation exists here. *Where the same type of question is used so often it can only be because the prosecutor considers it effective*. And to say that an error is "effective" is to say that it is prejudicial. The words of *Pierce v. U. S.*, 86 F. (2d) 949 have unparalleled force when the prosecution employs the same method as often as it has done here (p. 953):

"That it was intended to prejudice the jury is sufficient ground for a conclusion that in fact it did so."

All this was aggravated because the prosecutor used this objectionable method in cross-examining on Overt Act 6.

We submit that these 240 pages of improper cross-examination of the defendant in themselves require reversal of the judgment.

b. Improper cross-examination on Overt Act 8.

At XLIX-5439-46 comes *improper cross-examination on Overt Act 8*. Defendant testified on direct examination *only* with regard to Overt Acts 2, 3, 5, 6 (Defendant, XLVI-5119-25.) Cross-examination as to others was therefore beyond the scope of the direct and improper. (See authorities below.) Similar improper cross-examination on Overt Act 1 occurred at XLIX-5412-18 and on Overt Act 4 at XLIX-5427-34. *But it is the cross-examination on Overt Act 8 which is prejudicial despite the jury's finding in favor of the defendant.* That is so because in argument the prosecutor used this cross-examination *to impeach defendant's entire testimony.*

Since the cross-examination on Overt Act 8 occupies *seven pages of the record* we set it forth in the appendix. (XLIX-5439:17-5446:11, App. p. 39.) The key appears right in the first question, however (XLIX-5439:17-5440:19):

“Q. Did you appear in this hat dialogue that you heard testimony about? Do you know what I am talking about?

Mr. Collins. Just a moment. We object to that, if Your Honor please, upon the ground it is improper cross-examination of the witness upon matters that were not touched upon on the direct examination of this witness.

The Court. The objection will be overruled. Read the question.

(Question read.)

Mr. Collins. If Your Honor please, I wish now to assign this as constituting misconduct on the part of counsel for the prosecution knowingly to cross-examine this witness or attempt to cross-examine this witness on matters that were not developed on her direct examination.

The Court. The Court is responsible for the rulings here. No one else is. You have a record. Now let us proceed in the usual way. Reframe your question and let us proceed.

Mr. DeWolfe. Q. Did you participate in a dialogue with George Mitsushio about a hat?

Mr. Collins. Since the question has been reframed, I wish now to interpose my objection again, if Your Honor please.

The Court. The objection will be overruled.

Mr. Collins. I object to it on the ground it is improper cross-examination of the witness on matters not developed upon her direct examination.

The Court. The objection is overruled.

Mr. DeWolfe. *Overt Act 8, sir.*

The Witness. I can't recall that dialogue."

The prosecutor later made the following argument on the basis of this cross-examination (II Arg. 337:23-339:13, note especially II Arg. 339:9-13):

(See Appendix p. 45 for II Arg. 337:23-339:8.)

II Arg. 339:9-13:

"She denies that. *And if you find that she is telling you an untruth about that incident, that is a material incident, that is one of the overt acts. You can, if you want to, in that instance disregard the balance of her testimony in its entirety; whether or not you want to is up to you. * * **"

This attempt to discredit defendant's entire testimony gives the incident significance far beyond Overt Act 8 itself. If the cross-examination was improper, it was also prejudicial.

The prosecution could not cross-examine on Overt Act 8 when the defendant herself had not testified upon it. This

is true both because of the rule limiting the cross-examination to the scope of the direct, and because of the privilege against self-incrimination. The object of cross-examination is to break down the direct testimony; if a defendant does not testify on a subject there is nothing to break down. *Cross-examination of the defendant cannot be used to establish independent elements of the prosecution's case.* If the defendant testifies to only certain elements of the charge, the prosecution cannot cross-examine on other elements. See *Tucker v. U. S.*, 5 F. (2d) 818 (C.C.A. 8), at p. 822:

“The primary purpose of cross-examination in the federal courts is to test the truth of testimony adduced by direct examination and to clarify or explain the same. *It is not to prove independent facts in the case of the cross-examining party.*

“If there is good reason why a defendant should not be compelled to be a witness against himself, there ought to be equally good reason why, if he has testified voluntarily upon one issue, he should not be compelled to testify against his will concerning matters wholly unrelated to that issue, which would not be within the scope of proper cross-examination if he were an ordinary witness.

(p. 824) :

“The questions asked the witness Dudley Tucker on cross-examination were *clearly outside the scope of his direct testimony. They had reference to the second element of the offense charged while his direct testimony was limited to a refutation of the first element.* The questions on cross-examination did not in any way test the truth of the direct examination; they did not seek to explain or modify the same; *they were*

asked for the sole purpose of proving an independent element in the government's case.

* * * * *

“For the reasons above stated, the cause is reversed * * *”

This language applies exactly to the present case. The defendant testified with regard to Overt Acts 2, 3, 5 and 6. (The defense as to Overt Act 8 was that it was *trivial*.) Cross-examination with respect to Overt Act 8 was not intended to break down or clarify the direct testimony; *it could serve only to establish an independent element of the government's case.* (Either the defendant would have to give evidence against herself, or she would have to lend importance to Overt Act 8 by contradicting the government witnesses.) The cross-examination was therefore improper and prejudicial. A similar analysis is made by the Supreme Court of Washington in *State v. Crowder*, 119 Wash. 450, 205 Pac. 850, discussing the contention that the direct testimony had opened the subject (p. 852):

(See Appendix p. 47.)

To the same effect:

Wilson v. U. S., 4 F. (2d) 888 (C.C.A. 8);

State v. Hall, 20 Mo. App. 397, 404-5 (the “dissenting” opinion is the majority opinion upon this point);

Lombard v. Mayberry, 24 Neb. 674, 40 N.W. 271, 279.

In the present case, defendant denied Overt Act 8 when the prosecution “cross-examined” her upon it. This only served to give it importance, which was increased when the prosecution introduced rebuttal evidence and *finally*

argued that the conflict was a ground for disbelieving defendant's entire testimony. That was especially prejudicial on Overt Act 6, where, as we have indicated, defendant's own testimony was her chief defense. The erroneous cross-examination on Overt Act 8 together with the argument based upon it, in themselves require that the judgment be reversed.

c. Various erroneous rulings in cross-examination of defendant.

(1) The long procession of errors begins at XLVII-5242:13-24:

“Q. * * * You have never regained Japanese nationality since January 13, 1932?

Mr. Collins. Well, I object to that, if Your Honor please, on the ground that is calling for the opinion and conclusion and furthermore, it is an impossibility. She never had Japanese nationality.

Mr. DeWolfe. She had Japanese nationality.

Mr. Collins. She never had Japanese nationality. It is an absolute impossibility, as a matter of law.

Mr. DeWolfe. We will see about that.

The Court. Just a moment. The objection will be overruled. She may answer if she knows.”

The same thing is repeated on the next page (XLVII-5243:10-20):

“Q. Did you ever regain Japanese nationality since January 13th, 1932?

Mr. Collins. Object to that on the ground it is calling for the opinion and conclusion of the witness and is calling furthermore for a legal impossibility. The witness was born in the United States; she could not have had Japanese nationality.

The Court. The objection will be overruled. She may answer if she knows.

A. Well, my understanding was that I had dual citizenship when dual citizenship was recognized.”

The question whether defendant regained Japanese nationality *first* calls for a legal conclusion; *second*, assumes a fact not in evidence—that she ever *had* Japanese nationality (which is the gist of the objection of “impossibility”). The objections were good. The fact that defendant in exhibit 5 spoke about “not regain[ing] her Japanese nationality” does not alter the fact that the question calls for a conclusion and assumes a matter not in evidence. Exhibit 5 itself was already in evidence; the question asked did not refer to it. They were objectionable on the grounds stated and the objections should have been sustained. At XLVII-5245:13-25 the question was asked in another form:

(See Appendix p. 47.)

Note at 5244:17-22 the prosecutor asked the only proper question—whether defendant had made the statement in Exhibit 5. The question at 5245, *supra*, was improper—whether Exhibit 5 “refreshed her recollection” about something *which involved a conclusion in the first place*. The defendant’s earlier answers necessarily involved an attempt to give a legal conclusion: *she did not testify that she “could not remember”*. Consequently the insinuation that defendant had “forgotten” (which is involved in the question about “refreshing recollection”) *piles a misstatement of her testimony on top of the improper questions*.

Berger v. U. S., 295 U.S. 78, 84, holds *misstatement of facts in question to be reversible misconduct*.

(2) At XLVII-5310:10-5311:10 the prosecutor is permitted to ask the defendant *what she thought the Jap-*

anese militarists were thinking—a plain case of calling for a conclusion. (See Appendix p. 48.)

(3) At XLVIII-5320-21 the prosecutor is allowed to ask the defendant about a conversation between herself and her husband.

(See Appendix p. 50.)

The passage to which the prosecutor refers in saying “the husband has waived it” is XLIV-4879:17-19—cross-examination of Philip d’Aquino:

“Q. And she told you since she had been over here that she is a Portuguese national?

A. That’s also correct, sir.”

We missed the objection here. But the fact that, in a torrent of improper questions, we missed an objection *when the husband was on the stand* does not entitle the prosecutor to question *the wife* about privileged communications. In the first place, the privilege is the privilege of the *communicating spouse*—here the defendant. (*Fraser v. U. S.*, 145 F. (2d) 139, 144; 8 *Wigmore on Evidence* (3d ed.) sec. 2340.) The simple fact that the husband testified therefore is not a waiver. A waiver can come, if at all, only from the fact that when the prosecutor asked this question of the husband, defendant, through her counsel, failed to object. While we have found no case directly in point, the general rules of waiver do not include failure to object under such circumstances. Wigmore says that “the waiver may be found * * * in some act of testimony which in fairness places the person in a position not to object consistently to further disclosure”. (8 *Wigmore on Evidence* (3d ed.) sec. 2340(2)). Under this formula, there was no waiver. *First*, there was no

“act of testimony” on the part of the defendant. *Second*, no consideration of fairness prevents the defendant from claiming the privilege herself. The prosecutor had “slipped one over” when he got the answer from the husband without objection. The fact that he got an answer to which he was not entitled certainly does not raise any elements of fairness in his favor. *Corpus Juris* gives the following formula (70 C.J. 464, sec. 631):

“The privilege is waived whenever *the person entitled* to the protection of the statute *voluntarily makes public* matters of which a disclosure without his consent is forbidden, or calls or *expressly* consents to a witness testifying as to such matters.”

Here “the person entitled” (defendant) did not voluntarily make anything public. The husband was on the stand, not she. As we said, what happened was that her counsel missed an objection in a trial where the prosecution employed improper questions almost without restraint.

The closest cases which we have found are *Kelley v. Andrews*, 71 N.W. 251 (Iowa) failure to object to wife’s testimony at former trial does not waive privilege at subsequent trial when wife again on the stand (p. 251):

“*Silence under such circumstances should not be construed as assent*”.

Dalton v. People, 189 Pac. 37 (Colo.—letter from wife to husband—p. 38—“*The unauthorized disclosure of the letter by the addressee does not waive the privilege*”).

It follows that the Court erred in allowing the prosecutor to question the defendant about statements which she had made to her husband.

(4) At XLVIII-5323-4 the prosecutor is allowed to ask another question plainly calling for the conclusion of the witness. This question is then repeated over and over in different forms:

XLVIII-5323:13-5324:23—

“Q. And you knew that all the Japanese radio programs were Japanese propaganda, did you not, Mrs. D’Aquino?”

The sequel is printed in appendix p. 51. The prosecutor is bent on introducing the *conclusions* which were written into Exhibit 24 *as independent evidence*.

Exhibit 24 (the statement to Tillman) was already in evidence and spoke for itself. The questions which were asked either called for conclusions, or were subject to the objection that the exhibit was the best evidence of its own contents.

This passage illustrates how the prosecutor was never satisfied to ask an improper question once. The repetition of impropriety is an element which makes these errors indubitably prejudicial.

(5) At XLIX-5392:5-21 there are more questions calling for the conclusion of the witness:

(See Appendix p. 52.)

(6) At XLIX-5476:13-22, the prosecutor again calls for the conclusion of the witness:

(See Appendix p. 53.)

To ask what another person “knew” is a typical call for a conclusion. And the prosecutor knew it to be such (compare objection at VII-476:1-2, sustained by Court “calling for a conclusion of knowledge on the part of

other people'') yet when the prosecutor asked that kind of a question the defendant was compelled to answer it.

(7) At XLIX-5488:5-20 the Court overrules an objection to a question which is clearly argumentative:

(See Appendix p. 53.)

Inserting the words "the land of your ancestors" is simply an argument that the defendant ought to have an affection. It would be proper in an argument to the jury, but not in a question to the witness.

(8) In view of the different opinions expressed by various officials about defendant's citizenship, it was calling for a conclusion to ask *her* that question.

XLIX-5494:7-13:

(See Appendix p. 54.)

(9) The prosecutor had a habit of arguing with defendant about her answers, and sometimes even before she answered. He frequently asked two and three questions in a row before waiting for an answer. All objections that his questions were argumentative were overruled. The first such passage occurs at XLVII-5251:10-5253:11, which we set forth in the appendix. (Appendix, p. 54.)

A witness has a right to have a question reread if she does not understand it the first time. Here the prosecutor's question contained a succession of negatives, and was for that reason unclear. It was wholly improper for the prosecutor to counter the request for a rereading by asking "was the question hard for you to understand"—especially after defendant had told him why she wanted the question reread. (XLVII-5251:14.)

(10) Further samples of the badgering, quibbling, cross-examination which defendant was forced to undergo (all over objection) are set forth in the appendix. They occur at XLVII-5296:8-5297:3; XLVIII-5320:15-5321:11 (this is the same passage in which the prosecutor asked defendant about statements to her husband; the error is aggravated by argumentative questions after defendant stated she could not recall). At XLVIII-5328:2-5331:24 and again at 5386:23-5387:13 the prosecutor asks *eight times* whether the defendant knew the Japanese purpose of the Zero Hour. This series is interspersed with argumentative questions, such as “can you say no?” The witness answered each of the prosecutor’s questions (when he did not interrupt her), but he nevertheless asked substantially the same question eight times. While a certain amount of repetition is legitimate on cross-examination, we submit that eight repetitions is pure harassment: XLVIII-5376:21-5378:12; XLVIII-5379:4-5382:4 (skip 5381)— (“are you prepared to say it was your voice” is obviously argumentative); XLIX-5408:15-5409:14 (Exhibit 15 was already in evidence—the questions themselves were argumentative); XLIX-5476:2-12.

(11) Lastly the prosecution questioned defendant about a great many matters to which she did not testify on direct. These instances appear at XLVIII-5374:6-23 (whether she told Cramer that she did not take out Japanese citizenship because it was too much trouble); XLVIII-5376:21-5378:1 (whether she told Cramer that by a process of elimination she concluded that “Tokyo Rose” referred to her); XLVIII-5382:14-23 (whether she told Cramer that she would rather broadcast than type); XLVIII-5383:2-10 (whether she told Cramer that broad-

casting might come in handy for the future); XLIX-5447:23-5447A:6 (questioning about alleged broadcast of November 11, 1944); XLIX-5450:7-20 (questioning about alleged broadcast of December 8, 1944).

We set forth all of the above passages in the appendix. (Appendix, pp. 56-61.)

All of these were matters which had come into the record from various witnesses but on which the defendant had given no direct testimony. She did not testify as to any conversations with Cramer. (Defendant, XLVI-5159:3-5160:18.) Nor did she refer to the scripts which the prosecution had put into the record on the cross-examination of Reyes. All this "cross-examination" of defendant, therefore, *could not have had for its purpose the breaking down of any of her testimony. Its sole object was to use the defendant herself to establish independent items in the prosecution's case.* Under the authorities cited in discussing Overt Act 8, *the cross-examination of the defendant cannot be used for that purpose.* Likewise under those authorities, *attempting to make defendant give independent evidence against herself requires reversal of the judgment.*

d. Summary.

The cross-examination of defendant denied her a fair trial. The prosecutor argued with her, called for conclusions, demanded that she assess the truth or falsity of other witnesses, went beyond the scope of her direct to use her cross-examination to establish independent sections of the prosecution's case. This last was especially true of the "cross-examination" on Overt Act 8, which was then used to attack her entire testimony. Since her

own testimony was her main defense to *Overt Act 6*, it was essential that testimony should be fairly presented to the jury. Instead, the prosecutor violated one rule of evidence after another. Errors of law during defendant's cross-examination in themselves require a new trial.

2. MISSTATEMENTS OF THE RECORD.

Besides asking improper questions the prosecutor frequently misstated the record during his cross-examination of defendant. We now list the misstatements which have not already been mentioned in connection with the errors in evidence.

a. Misstatement of Kuroishi's testimony re defendant's job application.

The first misstatement occurs at XLVIII-5356:25-5357:12:

“Q. And you told Miss Ito in the winter of 1943 that Kuroishi had told you to apply for *the job* at Radio Tokyo and that several other girls had applied for the same job?

A. Oh, there are some parts of it that are not correct.

Q. That is not correct, it is?

A. Maybe I had mentioned in talking to Mr. Kuroishi about a job at Radio Tokyo, but I did not apply to Radio Tokyo as an announcer.

Q. Did you tell Miss Ito in the winter of 1943, is the question, that Edward Kuroishi had told you to apply for *the job* and that several other girls had applied for the same job?

The question is, did you tell Miss Ito that?

A. No, I did not. I could not have told her that.”

Use of the words "the job" gives the impression that she applied to Kuroishi for a job *as announcer*. This was also the impression which the prosecution tried to give on Kuroishi's direct examination. But Kuroishi testified quite explicitly on cross-examination that defendant applied to him *for a job as a typist in the business department* (Kuroishi, XXI-2285:18-21):

"Q. But it was true Mr. Kamiya, rather, it was through your intervention with Mr. Kamiya that the defendant obtained work at Radio Tokyo in the business office as a typist, wasn't it?

A. Yes, sir."

b. Misstatement of defendant's testimony re autographs.

At XLIX-5398:11-13 the prosecutor misstates defendant's own testimony (XLIX-5398:6-5399:5):

(See Appendix p. 61.)

The prosecutor *did* misstate the record—defendant's earlier testimony is found at XLVIII-5340:2-5341:17. It refers partly to Eisenhart through whom the prosecution introduced Ex. 2 (I-37) the autographed Japanese paper money (*not a script*).

c. Misstatement of Cousens' testimony.

At XLIX-5458:24-5459:5 the prosecutor misstates Cousens' testimony:

"Q. You heard Cousens say that he was against the allied policy of unconditional surrender, didn't you?

Mr. Collins. There is no such testimony, if your Honor please, from the witness Major Cousens.

Mr. DeWolfe. He broadcast on it. He admitted himself he was against it.

Mr. Collins. He said he did not broadcast such a thing.’’

Cousens actually testified as follows (XXX-3432:17-3433:2):

(See Appendix p. 62.)

d. Recross examination—misrepresentation of Exhibit 9.

The worst misstatement of evidence came in defendant’s *recross* examination. Here the prosecutor browbeat her for six pages trying to make her retract something *which the prosecution itself had put into evidence through one of its own exhibits*.

Government’s Exhibit 9 is a letter written on March 12, 1947, by defendant to the American Consular Service at Yokohama. In it she says, *inter alia*,

“I have not been able to apply sooner for re-establishment of my American citizenship as circumstances prevented me from getting in touch with the proper authorities.”

Yet through six pages of sneering, bullying recross-examination the *prosecutor tries to make her say that she never applied for reestablishment of her citizenship!* This disgraceful exhibition appears at L-5540:14-5546:1 and is set forth in the appendix. (Appendix pp. 63-8.) It contains an additional misstatement, besides generally trying to make defendant deny the existence of Government’s Exhibit 9. At L-5540:18-20 the prosecutor says “if you will look at *government’s exhibit 5—and I think it is the same as your exhibit*, this paper; if not, I will let you look at your own exhibit . . . ” This is a misleading suggestion. Defendant’s Exhibit BP contained both government Ex-

hibits 5 and 9. By suggesting that Government Exhibit 5 contained everything, the prosecutor was drawing defendant's attention away from Exhibit 9, which was the crucial exhibit on "reestablishment of citizenship". And the record further shows that *the prosecutor was quite aware of Exhibit 9*. For when defense counsel reread it to the jury (L-5558:14-16) the prosecutor said (L-5558:17-18):

"Mr. DeWolfe. I see no reason for reading this same letter *twice* to the jury."

e. Such deliberate distortion of the record has always been held reversible misconduct.

See *Berger v. U. S.*, 295 U.S. 79, 84, where the Supreme Court included among grounds of reversal:

"That the United States prosecuting attorney overstepped the bounds of that propriety and fairness which should characterize the conduct of such an officer in the prosecution of a criminal offense is clearly shown by the record. *He was guilty of misstating the facts in his cross-examination of witnesses; of putting into the mouths of such witnesses things which they had not said * * ** of assuming prejudicial facts not in evidence; *of bullying and arguing with witnesses; and in general of conducting himself in a thoroughly indecorous and improper manner.*"

Beck v. U. S., 33 F. (2d) 107, 114 (C.C.A. 8):
(See Appendix p. 68.)

3. SUMMARY.

The cross-examination of the defendant abounded in improper questions and in misstatements of the record by the prosecutor. It requires that the judgment be reversed.

F. IDENTIFICATION AS "TOKYO ROSE".

Exhibit 2 was introduced in advance of the government's main case. After having identified defendant as "Tokyo Rose" the prosecution offered documents to prove defendant's citizenship, and only then resumed the story of her activities in Japan. *This shows how important the prosecution considered pinning the label "Tokyo Rose" on defendant.* The trial judge and the United States Attorney succeeded in committing several errors upon this issue, besides the erroneous admission of Exhibit 2. These errors consisted both of admitting improper evidence on behalf of the prosecution and excluding proper evidence on behalf of the defense.

1. HEARSAY NOTATIONS ON EXHIBITS 16-21.

Exhibits 16, 17, 20 were phonograph records of Zero Hour broadcasts taken by the Portland, Oregon, monitoring station (XVI-1627, 1638, 1646). Exhibit 21 was taken for amusement by Sodaro, the radio engineer at Silver Hill, Maryland. (*Sodaro*, XVII-1725:16-18.) These records were introduced through one Penniwell, a radio engineer (*Penniwell*, XVI-1614:18-23) who had made them (*Penniwell*, XVI-1623:25-1624:6; 1635:22-1636:1; 1642:13-19; 1644:7-8), and through Sodaro (XVII-1729). Penniwell had made several notations on these records, one of which was "Tokyo Rose" (*Penniwell*, XVI-1628:25; 1634:13, 1640:18-20; 1647:19-23). These notations were offered as having been done as part of the witness's "governmental official duties". (XVI-1640:18-21.) Being an engineer, his duties were not connected with the contents of the program. (*Penniwell*, XVI-1663:12-14, 1663:22-1664:3.) Sodaro made a similar notation which was not claimed

to be official. (*Sodaro*, XVII-1732:3-7.) Defendant objected separately to the admission of the notations "Tokyo Rose", XVI-1635:3-19, 1641:6-1642:10, 1645:6-17; XVII-1728:8-12). These objections were overruled. (XVI-1642:11-12, 1646:11; XVII-1729:14-15.) Admitting such an *ex parte* notation as part of an "official" record is precisely the error for which the same District Judge was reversed in *Prevost v. United States*, 149 F. (2d) 747. That was a prosecution for violation of the Nationality Act in which the Court admitted a similar *ex parte* notation saying that the defendant was "German". This Court said (p. 749, col. 1):

"The caption was not written or signed by appellant. So far as the record shows, appellant never saw it until it was offered in evidence at his trial. He objected to it as hearsay. It was hearsay. Its admission was erroneous and prejudicial."

And similar language concerning another exhibit at 149 F. (2d) 747, 749 col. 2. *This language applies word for word to the notation "Tokyo Rose" on Exhibits 16, 17 and 20.* At some stages of the trial the government based its "official record" claim on 28 U.S.C. 1733 b. But that section deals with "books or records of account or minutes of proceedings" which clearly do not include an engineer's notation "Tokyo Rose" on a phonograph record. *The Sodaro notation on Exhibit 21, not claimed as official, does not have even that much color of legality.*

Under *Prevost v. U. S.*, the foregoing errors require the judgment to be reversed.

2. EXCLUSION OF DEFENDANT'S EVIDENCE.

The defense tried to show that the name "Tokyo Rose" had been in circulation *long before defendant began to broadcast*. This would show that defendant was *not* "Tokyo Rose"; it would also corroborate defendant's testimony that when she autographed her programs as "Tokyo Rose" she did so only at the suggestions of the soldiers. (Defendant, XLVIII-5340:7-12.)

All attempts to show that "Tokyo Rose" was current *before* defendant began to broadcast were blocked. Defendant began broadcasting in November, 1943. (Government's opening statement I-17:17-18; Cousens, XXVIII-3177:1-7, 3182:13-14.) Defendant tried to show that the phrase was known earlier at the following parts of the transcripts:

Hagedorn, XXXIX-4327:19-4328:3, 4329:2-4331:3, and defendant's Exhibit Z for identification. (XXXIX-4337.) The testimony is set forth in the appendix. (Appendix p. 68.) Exhibit Z for identification was Mrs. Hagedorn's radio log and contains a reference to "Tokyo Rose" on *July 25, 1943*. Since this is a contemporary notation it proves conclusively that the term "Toyko Rose" was current before defendant began to broadcast, and *therefore must have referred to someone else*. This evidence was clearly relevant to rebut the Government's attempt to pin the label on defendant. In view of the importance which the Government attached to the point, the exclusion was certainly prejudicial.

The testimony of Whitten on this subject was blocked in part. At XXXVIII-4304:24-5 he fixes the date at April, 1942. At XXXVIII-4306:7-10 he starts to testify that

someone asked him whether he wanted to hear “Tokyo Rose”, but the answer is cut short by an objection.

The prosecution likewise blocked similar testimony from Sam Stanley.

(See Appendix p. 70.)

Proof that a woman radio broadcaster was dubbed “Tokyo Rose” *on or before October, 1943*, shows that defendant was not the one. A second error occurs when the Court *denies opportunity to make an offer of proof!*

Major Williston Cox was partly prevented from giving evidence on this subject. He first testifies that he was shot down on *August 5, 1943* (Cox, XXXVII-4242:2-8). The examination as to “Tokyo Rose” is set forth in the appendix. (Cox, XXXVII-4243:15-4244:25; Appendix p. 72.) At XXXVII-4246:21-5 the witness was allowed to say that a woman broadcaster at this time was referred to as “Tokyo Rose”.

The Court likewise refused to let Nalini Gupta testify that he had heard the name “Tokyo Rose” in 1942 (Nalini Gupta, XXXIX-4413:21-4414:13):

(See Appendix p. 73.)

A similar ruling on the same witness occurs at XXXIX-4428:20-4429:20.

So far as the answers come in before objection, it must be assumed that the jury disregarded them. The Court later instructed them to disregard all *evidence* to which objection was sustained. (LIV-5988:8-11.) The fact that defendant obtained one answer showing “Tokyo Rose” to have been current in August 1943 leaves the other rulings still prejudicial. Had all the witnesses been

allowed to testify they would have *corroborated one another*. Furthermore Mrs. Hagedorn's log entry was a written record, better than unaided recollection. Defendant was deprived both of the corroboration and of the written record.

3. SUMMARY.

On the identification as "Tokyo Rose" the Court not only admitted improper evidence on behalf of the prosecution, but excluded relevant evidence on the part of the defense. The rulings on this phase of the case were undoubtedly prejudicial.

G. REFUSAL TO PRODUCE DEFENDANT'S WITNESSES FROM JAPAN.

Defendant moved the trial Court to have her witnesses brought from Japan to the United States, so that they could testify in person and their demeanor be observed and weighed on the witness stand. Only alternatively did defendant ask for opportunity to take their depositions. (R. 117, 122-9.) Supporting affidavit at R. 130ff. That motion was denied and, in lieu thereof, her motion to take their depositions in Japan was granted. (R. 166, 167.)

The government on the other hand brought its Japanese witnesses to the United States (*Tsuneishi, Oki, Mitsushio, Nakamura, Moriyama, Higuchi, Yamazaki, Ikeda, Kuroishi, Nii, Tanabe, Okamoto, Momotsuka, Sugiyama, Igarashi*—16 in all).

The denial of the right to have the Japanese witnesses at the trial, violates the VIth Amendment and the statutes which have been passed to implement it. In *Gillars v.*

U. S., C.A. D.C. No. 10187, the Court of Appeals of the District of Columbia made the following remark (slip opinion, p. 16):

“The serious constitutional difficulty which might arise by reason of the absence of compulsory process to aid an accused who has been involuntarily transported to the United States for trial, far removed from the vicinity of the acts charged is not presented for decision. The five witnesses for whom subpoenas were asked were all brought to this country by the Government.”

In the present case, however, “the serious constitutional difficulty” does arise. *The Government did not bring a single witness from Japan on behalf of the defendant.*

That is true though the Government had sufficient control over Japan that it was able to bring its own witnesses. (Phil d’Aquino came from Japan on behalf of the defendant, but he came *on a Portuguese passport.*)

The VIth Amendment to the United States Constitution provides in part:

“In all criminal prosecutions, the accused shall enjoy the right * * * to have compulsory process for obtaining witnesses in his favor * * *”

18 U.S.C. 3005 expressly provides that in capital cases including treason, the defendant shall be enabled to get witnesses *in the same manner as is usually accorded the Government.* It reads:

“He shall be allowed, in his defense to make any proof that he can produce by lawful witnesses, and shall have the *like process* of the court to compel his

witnesses to appear at his trial, *as is usually granted to compel witnesses to appear on behalf of the prosecution.*”

Occupied Japan is in the same situation as the outlying possessions of the United States. It goes without saying that the United States has always been able to bring prosecution witnesses from Alaska, Guam, Samoa, etc. Here the Government brought its own witnesses from Japan; to deny defendant a corresponding right was a clear violation both of 18 U.S.C.A. 3005 and of the VIth Amendment. For that irregularity the judgment must be reversed.

H. ERRORS IN INSTRUCTIONS.

We now consider the errors in Instructions other than those already discussed in connection with specific subjects. We shall take first instructions given and then instructions refused.

1. ERRONEOUS INSTRUCTIONS GIVEN.

a. The following instruction purporting to distinguish intent from motive is an argument in favor of the prosecution (LIV-5975:4-22):

“Intent and motive should never be confused. Motive is that which prompts a person to do an act. Intent refers only to the state of mind with which the act is done.

A good motive, even a laudable one, may prompt a person to commit a crime. Personal advancement and financial gain are two well recognized motives for much of human conduct. Those motives may prompt

one person to voluntary acts of good, another to voluntary acts of crime.

Good motive is never a defense where the act done is a crime. If a person does intentionally an act which the law denounces as a crime, motive is immaterial.

Let me illustrate. I belong to a benevolent society—one that feeds the poor. The organization is badly in need of an automobile to make deliveries of food. This circumstance induces, moves me to steal an automobile from my neighbor. My motive is a laudable one, but my intent is an entirely different matter. I intend to steal, commit larceny, and it is no defense at all to a charge of larceny that my motive was praiseworthy.”

Exception was taken at LIII-5932:20-23. This instruction distinguishes between motive and intent *only so far as this distinction may help the prosecution*. The illustrations are entirely illustrations calling for a guilty verdict. Putting them in the instruction constituted a *pro tanto* argument in favor of conviction. Such one-sided matter in an instruction is objectionable. Compare the language of *Weare v. U. S.*, 1 F. (2d) 617, 619 (C.C.A. 2).

“The jury can easily be misled by the court. Its members are sensitive to the opinion of the court, and *it is not a fair jury trial when the court turns from legitimate instructions as to the law to argue the facts in favor of the prosecution*. The government provides an officer to argue the case to the jury. That is not part of the court’s duty. He is not precluded, of course, from expressing his opinion of the facts, but he is precluded from giving a one-sided charge in the nature of an argument”.

The intent-motive instruction errs in precisely this respect.

b. The following instruction is inapplicable to the facts of this case (LIV-5975:23-5976:10):

“In the case on trial, if you find that this defendant voluntarily performed an act, or acts, which she knew would give aid and comfort to a country or its citizens or agents known to her to be enemies of the United States, and that she intended by so doing to assist the enemy or injure the United States and betray her own country, she can not avoid the consequences of her act by asserting that her motive was not to aid the enemy, or that her motive was a desire for financial gain, or to provide herself with a means of livelihood. Motive can not negative an intent to betray, if you find that the defendant had such an intent. Where a person has an intent to bring about a result which the law seeks to prevent, his motive is immaterial.”

We excepted at LIII-5932:24-5933:4. The defendant never made the defense that though she intended to aid Japan, she had a good motive in doing so. The defense throughout was that she did not intend to aid Japan—that she was coerced into broadcasting, and that when she did broadcast she always tried to make her broadcasts either innocuous or favorable to the United States.

An instruction unsupported by evidence is error. It may be prejudicial. (*Thomas v. U. S.*, 151 F. (2d) 183, 186 (C.C.A. 6); *Patterson v. U. S.*, 222 F. 599, 649-50 (C.C.A. 6).

In the present case the instruction is prejudicial because it suggests an admission which the defendant never made.

It suggests that the defendant at some time took the position that although she may have intended to betray the United States, she had a good motive in doing so. But that was not the case. The effect of the instruction necessarily is to confuse the issues of motive and intent—to give the jury the impression that when the defendant denied any intent to betray she only denied a bad motive, and thus to deprive her of the benefit of her defense on the issue of intent. This confusion is not prevented by the previous instruction which “distinguished” between motive and intent only so far as that distinction could help the prosecution.

c. The instruction on defendant’s American citizenship mentioned the evidence which the government had adduced to prove citizenship, but passed over the evidence showing that the government had doubted or denied that defendant was an American citizen. The instruction reads as follows (LIV-5958:25-5959:12):

“You are instructed that there is evidence in this case disclosing that defendant was born in the United States on July 4, 1916. There is, likewise, evidence that in 1941 and 1947 defendant executed applications for passports in which she stated under oath that she was born in the United States and was a native-born American citizen. It is necessary for the United States to prove that subject was an American citizen during the period of time the acts complained of in the indictment were committed. Proof of American citizenship during the period of time is necessary in order to show that defendant was a person who owed allegiance to the United States within the purview of the treason statute and Article III, section 3, of the Constitution of the United States.”

Exception was taken at LIII-5933:17-21. Specifically this instruction fails to comment on defendant's Exhibit A (II-116) and on the evidence that United States Government officials classified defendant both as stateless and as Japanese. (See *supra*, p. 17.) The instruction violates the rule that the Court cannot comment on the evidence of one side without also mentioning the corresponding evidence of the other. (See cases, *supra*, p. 114.)

d. Defendant excepted to the following instruction (LIV-5970:14-5971:7):

"While, as I have stated, giving aid and comfort means real aid—something of value that assists the enemy in its war effort against the United States—it is not necessary that the acts done or the aid given be successful. It is only required that the acts be such that, if successful, they would encourage and advance the interests of the enemy. Thus, it is immaterial that the enemy mission as a whole, which defendant assisted, if she did assist, did not achieve its purpose. Accordingly, it is immaterial whether the Japanese propaganda directed at United States troops in the South Pacific, if you find such to have existed, achieved its desired result. It is not necessary that one single soldier, sailor, or marine be affected in any manner whatsoever by enemy propaganda or by anything said or done by the defendant, if you find beyond a reasonable doubt that she, in fact, participated in broadcasting over the microphones of the Broadcasting Corporation of Japan with the intent to adhere to the enemies of the United States, rendering them aid and comfort."

Exception was taken at LIII-5932:4-10. The vice of the instruction is that it does not permit the jury to consider

the lack of pro-Japanese results upon the issue of defendant's intent. The jury are told that lack of pro-Japanese results are immaterial "if you find beyond a reasonable doubt that she in fact participated in broadcasting * * * *with intent* to adhere to the enemies of the United States." In other words, the issue of intent is presented as something wholly separate from the issue of results. The defendant's position, on the other hand, is that her claim that *she did not intend* to aid Japan is *corroborated* by the circumstances that *she did not in fact aid them*. In short, the jury have a right to consider the lack of pro-Japanese results in deciding whether to believe defendant's testimony that she had no intent to aid Japan.

The instruction withdraws that phase from the jury. In so doing it errs on a vital point.

2. INSTRUCTIONS ERRONEOUSLY REFUSED.

The following instructions were requested by the defendant and refused by the Court. Exceptions to refusal of instructions were taken at LIII-5934:16-5935:6.

a. Instruction 30A, R. 292.

"You cannot consider the defendant's admissions upon any of the issues of (1) citizenship (2) aid and comfort or (3) intention unless you first find that the Government has introduced other credible corroborative evidence on the same issue.

Pearlman v. U. S., 10 F. (2d) 460, 461, 462 (CCA 9);

Goff v. U. S., 257 F. 294 (CCA 8)."

This instruction states the well known principle that the *corpus delicti* must be proved by independent evidence before the defendant's confessions may be considered. The

two cases cited in support show it to be correct. *No similar instruction was given* so there was a total failure to instruct upon the point. The refusal is prejudicial error.

b. Instruction 84, R. 296.

“If the jury find that the defendant did not intend to expatriate herself although urged to do so by others, that fact may be considered by the jury as some evidence that she did not intend to betray the United States.

United States v. Haupt, 136 F. 2nd 661, 675.

United States v. Robinson, 259 F. 685.”

This is an instruction to which defendant was certainly entitled. It correctly sums up the situation: the fact that defendant retained what she considered to be her American citizenship under great pressure to drop it, certainly tends to negative any intent to betray the United States. With this instruction refused, the facts were in the record but the jury were not instructed upon the point.

c. Instruction 88, R. 296.

“Various alleged statements by the defendant as well as records of voice tests have been admitted into evidence for your consideration. Before you deal with these from any other standpoint you must first determine whether the defendant made each of these voluntarily and of her own free will not acting either under inducement or threats. If as to any you do not find that the Government has shown the statement to have been made voluntarily, then you must discard any such alleged statement from your consideration of the case.

Bram v. U. S., 163 U.S. 532.”

Defendant's proposed instruction 88 states the proposition that after a confession has been allowed to go to the jury, the jury itself must *again pass upon* the question whether it was voluntary. If they find it to be involuntary, they must discard it.

That is the rule laid down in *Wilson v. U. S.*, 162 U.S. 613, 624, 40 L. Ed. 1090, 1097, and again in *Denny v. U.S.*, 151 F. (2d) 828, 833 (C.C. A. 4). It is adopted by Wigmore (3 *Wigmore on Evidence* (3d Ed.) sec. 861 (3) p. 349).

The Court did not submit this principle to the jury at all. In view of the numerous confessions which the prosecution introduced, the omission was prejudicial error.

d. Instructions on denial of speedy trial.

We have shown that the denial of a speedy trial requires a reversal of the judgment with directions to discharge the defendant. (Supra, part I.) At the very least, the jury should have been permitted to pass on the question whether the government's own actions in effect raised the bar of laches against it. Submission of this issue was requested in defendant's proposed instructions 161-169. (R. 318-20.) All were refused by the Court. The record raised the issue. Certainly the government's delay, its interference with defendant's opportunity to get evidence and its ultimate loss of evidence are not wholly without legal consequences. Either they block the prosecution outright, or they raise an issue of fact for the jury to decide. *The Court, however, treated all these actions of the government as having no legal significance whatever. That, we submit, was error.*

e. **Defendant's Request No. 60—R. 295.**

Defendant requested an instruction that "there is no direct evidence that any of the alleged overt acts aided Japan or weakened the United States." That is an understatement: there is *no* evidence that any of the overt acts aided Japan or weakened the United States at all. The instruction was *a fortiori* correct and should have been given.

f. **Summary.**

The above refused instructions were on points vital to the defense. Especially is that true of the instruction (84) that defendant's refusal to take Japanese citizenship is some evidence that she had no intent to betray the United States, and of the instruction (30 A) stating the proposition that the jury cannot consider the defendant's confessions unless they find the *corpus delicti* to have been proven by independent evidence.

For failure to give the foregoing instructions the judgment must be reversed.

I. MISCONDUCT OF THE PROSECUTOR.

We now consider the instances of the prosecutor's misconduct not already discussed. A number occur in the taking of evidence; the great majority are serious improprieties in the prosecutor's argument to the jury. We first take the misconduct in the argument.

1. MISCONDUCT IN ARGUMENT TO JURY.

a. Misuse of Exhibits 52 and 54.

Exhibits 52 (XXXIII-3741) and 54 (XXXIII-3825) were unsworn, extrajudicial statements which Reyes gave to the FBI.

Exhibit 52 was expressly limited to the impeachment of Reyes' credibility. (XXXIII-3779:10-22.) The prosecutor expressly said that the document was *offered on credibility and impeachment*. (XXXIII-3779:16, 21-2.) Defendant made a similar request to limit Exhibit 54, on which the Court did not expressly rule. (XXXIII-3825:7-15.)

Impeachment of the witness who signed it was the only purpose for which such a statement could be received. See *Bridges v. Wixon*, 326 U.S. 135, 153:

"We may assume that they would be admissible for purposes of impeachment. But they certainly would not be admissible in any criminal case as substantive evidence."

Yet with full knowledge of this principle (having stated it when Exhibit 52 was admitted) both United States attorneys argued extensively that Exhibit 52 *proved substantive facts in the case!*

(1) In the prosecution's opening argument we find the following (I Arg. 36:5-11):

"Reyes' statements that he made to members of the FBI are *quite illuminating*. He made a statement on October 2nd, 1948. It is *Government's Exhibit No. 52*, I think I will read the entire statement to you ladies and gentlemen. I think it is a very important piece of evidence in this case. *Proves conclusively that there was no sabotaging of the program.*"

Of course, Exhibit 52 is not “illuminating” *on the facts* of the case. It *does not prove* conclusively or at all “that there was no sabotaging of the program.” *The United States attorney knew that very well.*

After this introduction, he *read the exhibit in full* (I Arg. 36-41) and also Exhibit 54. (I Arg. 41-45.) Reading these exhibits after saying that 52 is “illuminating” and “proves conclusively” amounts to telling the jury to consider the exhibits *as proof of the truth of their contents.*

In short the United States attorney used the exhibits as substantive evidence expressly on the question whether defendant and the other prisoners sabotaged the program, and impliedly for their entire text.

We made the assignment of misconduct and request for an instruction at LIV-5939:6-12. The judge gave no instruction on the point. (LIV-5939:17-23, dealing wholly with another assignment.)

(2) As if this were not enough the prosecution *again used* Exhibit 52 as substantive evidence *in its closing argument* (II Arg. 328:1-21):

(See Appendix p. 74.)

Here the prosecutor uses Exhibit 52 to *prove the truth of its contents* with respect to *another defense witness, Cousens.*

And once having done so he returns again and again to the point, driving it in and gloating over it (II Arg. 329: 23-330:5):

“They got the right man in Charles Cousens, an *anti-war man who believed, according to the defense, in a beneficent Japan, in the domination of Asia by Japan,*

who was plugging against an unconditional surrender being imposed on Japan and *who was plugging, according to the defense testimony, valiantly for the Greater East Asia co-prosperity sphere. That is the defense evidence, and not the government's.*"

(II Arg. 336:4-7):

"And she is one of our little soldiers, fighting at the other end of the line, with *Cousens a proponent of the Greater East Asia co-prosperity sphere.*"

Defendant assigned these second passages as misconduct and again asked for an instruction on the effect of the evidence. (LIV-5941:7-11.) Again the Court did nothing. (LIV-5941:21-4.)

These arguments are flagrant misconduct. To use impeachment as substantive evidence is on the same footing as going outside the record. (Cf. *Taliaferro v. U. S.*, 47 F. (2d) 699 (C.C.A. 9).)

b. Reference to future prosecution of others.

At I Arg. 47:13-16 we have the following:

"Can we say as much for the other prisoners of war? I don't think so. However, they are not on trial in this case. Some of them we have no jurisdiction over; others may be put upon trial."

A request for an instruction to disregard was made (LIV-5939:13-16) and given. (LIV-5939:20-22.)

But an argument which brings in other alleged crimes not shown by the record has been held to require a new trial notwithstanding an admonition to disregard. See *Turk v. U. S.* (C.C.A. 8), 20 F. (2d) 129, 131.

- c. The prosecutor deliberately distorted the testimony of Sugiyama, so as to reverse its actual sense:

(II Arg. 321:5-9):

“Sugiyama, an employee of Radio Tokyo, although not a participant in the Zero Hour, said he heard the defendant broadcast to the troops who were fighting out in the South Pacific: ‘You must be lonely out there. It is very uncomfortable out there.’ ”

This telescopes two quotations *omitting an essential sentence from one*. The first quotation in full reads as follows: (*Sugiyama—XXIV-2506:16-18*):

“A. ‘Hello, you Orphans of the Pacific. This is Orphan Ann. You must be lonely out there. *Let me cheer you up with some music.*’ ”

The italicized sentence changes the tenor of the quotation. To say merely “You must be lonely out there” is calculated to have a depressing effect. That was the sense of the prosecutor’s quotation. But to add “Let me cheer you up with some music” shows that the broadcast is designed not to depress but to lift the spirits of the listeners.

To read the quotation *without this last sentence* (as the prosecutor did) is deliberately to distort the sense of the evidence. Such misconduct comes within the principle of *Taliaferro v. U. S.*, 47 F. (2d) 699 and *Berger v. U. S.*, 295 U.S. 78, 84.

- d. At II Arg. 344:23; 35:2, the prosecutor made the old familiar argument that the defendant should be convicted to serve as an example to others:

“This matter should serve as a warning to others that they cannot, in our great hour of peril, desert

their country and with impunity adhere to the enemy—and not, if the United States survives, be brought to book before a federal court of justice.”

A request to disregard was made at LIV-5941:12-14 and *not* given. (LIV-5941:21-24.) *Turk v. U. S.*, 20 F. (2d) 129, 131 holds such an argument reversible error even after an instruction to disregard.

e. Summary.

Each of the misstatements or misuse of evidence occurring in the prosecutor's argument has alone been held sufficient to reverse a conviction. Certainly four such transgressions must have that effect.

2. MISCONDUCT IN TAKING OF EVIDENCE.

Most of the instances of misconduct in the taking of evidence have already been covered under specific subject heads. We add a few other items:

a. In the direct testimony of *Igarashi*, there occurs the following (*Igarashi*—XXIV-2621:23-2624:10):

(See Appendix p. 75.)

In this situation the Court's instruction to disregard was clearly futile. The prosecutor succeeded in getting what he wanted by his coaching of the witness. Having the objectionable question re-read after the recess drove the same point home again both with the witness himself and with the jury. Such suggestions to the government witnesses deny the defendant a fair trial; certainly when combined with the other errors in this record.

b. In the cross-examination of Chiyeko Ito the following occurred (XL-4529:7-4530:5):

(See Appendix p. 77.)

An examination of Miss Ito's direct testimony will disclose that she did *not* testify on direct that she talked with defendant about her announcing. Shortly before the prosecutor had said so himself. (See XL-4528:7-15.) Here the prosecutor flatly misstates the record.

c. Once in the cross-examination of the defendant and once in the cross-examination of Reyes, the prosecutor used a tactic which we submit was inexcusable. First he told the witness to answer "yes" or "no" *and then explain*; then after the witness had given a categorical answer and requested leave to explain, the prosecutor denied it. We quote these passages in the appendix, Defendant, XLVII-5286:10-11, XLVII-5287:24-5288:13; Reyes, XXXIII-3788:7-23, XXXV-3966:5-6, 13-23. (Appendix, p. 78.)

It is quite evident from the above that the prosecutor was not seeking the truth but was bent on browbeating and oppressing the witnesses, including defendant. At the very least, it provides a background for other misconduct which the Court made no attempt to remedy. The prosecutor's whole handling of the case calls for a reversal.

J. ERRONEOUS RULINGS ON EVIDENCE.

1. EXCLUSION OF DEFENSIVE MATTER.

Many of the Court's rulings on evidence excluded defensive matter which the defendant tried to introduce.

a. Evidence that defendant's broadcasts were beneficial to United States morale, or at worst, harmless.

Defendant offered various evidence to show that her broadcasts were beneficial to the morale of American

troops. Such evidence is relevant notwithstanding the rule that proffered aid and comfort to the enemy need not have been successful. (*Chandler v. U. S.*, 171 F. (2d) 921, 941.) This latter rule is merely that it makes no difference whether broadcasts *calculated to aid the enemy failed in their purpose*. Here on the contrary, we wanted to show the effect on the listeners as part proof of the contention that the broadcasts actually were *calculated to aid the United States* and to injure Japan.

(1) Offered testimony of **Kamini Gupta**.

Kamini Gupta testified at XL-4554 ff. He was a chief warrant officer (XL-4555:12-15) in the Alaskan theater. (XL-4556:2-18.) He was called on to give secondary evidence of an Army bulletin circulated to staff officers of the United States Army and stating that the "Orphan Ann" program (defendant) was a morale builder among the American troops. (XL-4560:1-6; offer of proof, XL-4561:14-24.) A foundation had been laid for the admission of secondary evidence: the witness had no access to the bulletin itself. (XL-4559:15-18.) The government objected solely on the ground that the bulletin was incompetent, irrelevant, immaterial and hearsay. (XL-4560:7-8.)

The bulletin was clearly material on the issue whether defendant's broadcasts gave aid and comfort to the enemy or to the United States.

It was not hearsay because it constituted an admission by the party opponent. The United States is the party plaintiff in the case; the Army is a department of the plaintiff. The bulletin is identified as an official document. Consequently it is a statement of the United States itself—and competent as an admission.

Admissions made by authorized agents bind the United States just as much as any other litigant. Compare *The Silver Palm*, 94 F. (2d) 754, which was an admiralty case arising from the collision of The Chicago, a United States naval vessel with a British merchant ship. The United States was a party. Falsification of The Chicago's log by those who had charge of it was held material *as an admission against the United States*. *The Silver Palm*, 94 F. (2d) 754, 762—citing cases in which private litigants were parties and applying them equally against the United States. The United States is, of course, just as much a party in a criminal prosecution as it is in a case involving collision of a United States cruiser.

Compare, also, the statement of the Court of Claims in *W. L. Fain Grain Co. v. U. S.*, 68 Ct. Cl. 441, 445:

“The Government is not exempt from the rules of evidence that apply to other litigants.”

In *Hicks v. Hiatt*, 64 F. S. 238, 246 n, inferences arising from suppression of evidence were used against the government in a criminal case (courts martial).

A *direct admission* by a governmental department is certainly, admissible. Since the contents of the bulletin in question bear directly on the question of aid and comfort, exclusion was prejudicial.

(2) Exhibit BV for Identification.

Exhibit BV for identification (L-5599) was a citation to defendant issued by the United States Navy. Objections to its authenticity was expressly waived (L-5596:24-5597:1) but the document was excluded as incompetent, irrelevant and hearsay. (L-5597:1-3, 5599-5699:2.)

This exhibit raises exactly the same issues as the bulletin to which Kamini Gupta testified. It is relevant on the issue of aid and comfort to the enemy. Having been issued by the Navy, a department of the United States government, it is an admission of the party opponent.

On the motion for bail pending appeal the government asserted that this citation had been issued in a "jocular" vein. Of course, that is something which must be judged from the contents of the exhibit after it has been received in evidence: it goes to weight rather than admissibility. Moreover, even if the document was jocular, which we deny, it is relevant on the issue of aid and comfort: it shows that one of the departments most closely concerned could make light of something for which the defendant has now been sentenced to ten years in prison. From any standpoint the document was material; having been uttered by the government, it was not hearsay. Since it goes to a vital issue in the case, its exclusion was prejudicial error.

(3) Defendant's program substantially like United States broadcasts.

(a) Defendant tried to prove through its witness Paul that the defendant's broadcasts were of substantially the same character as those of the American Armed Forces radio program. This testimony was ruled out on the sole ground of "immateriality". See Paul XL-4455:22-4456:8:

"Q. During that same period of time that you listened to the Zero Hour program, did you also listen to the Armed Forces radio program?

A. Yes.

Q. Was the music that was on the Armed Forces radio program substantially the same in character as that which you heard on the Zero Hour program?

Mr. DeWolfe. I object to it as immaterial.

The Court. What is the purpose of the testimony?

Mr. Collins. To show the character of the music that was played, if Your Honor please.

The Court. The objection will be sustained."

Whether or not defendant's broadcasts were of the same nature as the broadcasts which the United States itself furnished its own forces, was clearly relevant to the issue of aid and comfort. An affirmative answer would support the defendant's contention that she was trying to aid the United States and not Japan. (Similar testimony had previously been admitted from defense witness Speed without objection. (Speed, XXXIX-4406:21-4407:1.) Here again the excluded evidence goes to a vital issue, and the ruling was prejudicial error.

(b) Defendant also tried to prove that our troops were never ordered not to listen to defendant's program. The Court disallowed the testimony from witness Stanley (XXXIX-4348:9-20):

"Q. Now, Mr. Stanley, did the army or the navy intelligence or the Seabee division or departments ever alert you or the officers or the men to listen or not to listen to that program?

Mr. DeWolfe. Objected to as incompetent, irrelevant and immaterial.

The Court. Objection sustained.

Mr. Collins. Q. Were you ever informed by your commanding officers or any officers of the army or navy intelligence or the Seabees that Orphan Ann was Tokyo Rose?

Mr. DeWolfe. Objected to as incompetent, irrelevant and immaterial, and hearsay.

The Court. Objection sustained."

and Paul (XL-4454:23-4455:3):

“Q. During that period of time were you or the crew alerted by Naval Intelligence to listen to the Orphan Ann program on the Zero Hour?

Mr. DeWolfe. Objected to as incompetent, irrelevant and immaterial and hearsay.

The Court. Objection sustained.”

though admitting the same from witness Speed. (XXXIX-4405:25-4406:15.)

Here as in the previous instance the Court's ruling deprived defendant of *corroboration* on a major point. It was unquestionably prejudicial.

b. Fraud in preparation of Government's case.

Defendant offered evidence of *fraud in the preparation of the government's case*—but the Court did not allow the jury to hear it. It is well settled that *fraud in the preparation of the case* is a relevant circumstance and may always be shown to weaken generally the opponent's position. Wigmore says:

(See Appendix p. 80.)

Hicks v. Hiatt, 64 F. S. 233, 246, n. 19, notes that while the principle has usually been invoked against defendants, it operates equally against the government.

(1) Fraudulent subpoenas to Government witnesses.

The trial was originally set for May 16, 1949, and then postponed at defendant's request to July 5, 1949. (R. 194-5.)

In short, the case was never on for any time in June. The Court may also take judicial notice that the trial of

cases in the United States District Court in San Francisco commences at 10:00 A.M., not at 9:00 A.M.

The government, however, caused to be issued 25 *subpoenas* ordering as many witnesses to attend the trial of *U. S. v. d'Aquino* in the courtroom, No. 338 Post Office Bldg., at 9:00 A.M. on June 27, 28, 29, 30 (different subpoenas were for different days, but all for one of these four days). *The bulk of these subpoenas was excluded.* (Defendant's Exhibit BT for Identification; L-5590.) Two had previously been admitted because issued to witnesses subpoenaed by both sides. (Reyes, Def. Exh. V, XXXIV-3942; Ito, Def. Exh. CC, XL-4544.)

Here we have black and white evidence of fraud in preparation of the case. *The government practiced wholesale deception on its own witnesses.* That is certainly something which reflects on the trustworthiness of the entire case. It is admissible under the principle stated by Wigmore in the above quotation.

In fact the government's own argument showed how important this evidence was. For in arguing to the jury the prosecutor grandiloquently assumed the halo. He even went so far as to claim that our charges of unfair and dishonest presentation were trumped up to support an indefensible case. These passages are quoted in the appendix. (II Arg. 260:2-5; 260:12-21; 292:22-293:9; Appendix, p. 80.)

In other words, the prosecution did here what it had done in other parts of the case: first it kept the facts out of evidence as "immaterial" and then it argued that they did not exist. The fraudulent subpoenaes were documentary proof that the government's preparation of the case

was not honest and above-board. As such they throw a shadow on the entire prosecution. That evidence should have been permitted to go to the jury for them to weigh with the other evidence in the case.

(2) Bribery of Government witnesses by Brundidge—alternative ground of admissibility.

(a) It has already been shown that Harry Brundidge went to Japan with John B. Hogan of the Department of Justice in March, 1948, to get defendant's signature to Exhibit 15. The United States government paid Brundidge's plane fare. (*Hogan*, VIII-630:18-631:5.) Brundidge was present when Hogan interrogated the defendant. (*Hogan*, L-5577:22-3.)

Defendant offered Brundidge's passport as further evidence of his official capacity in making the trip. (Defendant's Exhibit BR for Identification, L-5580.) Attached to the passport itself is an army permit which recites:

“Object—Official Business for the Department of Justice Endorsed by the Department of Justice”

The Court rejected this exhibit. We submit it is issued by a department of the United States government, and is competent as an admission of the party opponent. It is relevant to show Brundidge's connection with the United States government in the matters which we now proceed to relate.

(b) Brundidge bribed Hiromu Yagi, who testified before the grand jury for the government, and he attempted to bribe Toshi Katsu Kodaira, who gave a deposition for the defense. (See deposition of Kodaira, R. 671 ff., most of which was ruled out of evidence, and *Tillman*, XVI-

1597:17-1599:13.) Since the government called neither Yagi nor Brundidge at the trial, the Court excluded Kodaira's evidence.

Our position is *first*, that the evidence of expenses paid by the Department of Justice, plus Exhibit BR for Identification, which should have been admitted, establish *prima facie* that Brundidge was acting on behalf of the government when he was in Japan in 1948. *Second*, evidence of his corrupt activities on behalf of the government may be given even though he was not called as a witness. This is again under the rule of 2 *Wigmore on Evidence*, Sec. 278, and *Hicks v. Hiatt*, 64 F. S. 238—*fraud in the preparation of the case may always be shown to weaken generally the case of the opponent*.

(c) There is also an alternative ground on which Brundidge's corrupt activities are admissible. Such activities on the part of *a witness* will always be admitted to impeach the witness. See 3 *Wigmore on Evidence* (3d ed.), Sec. 690. Doubtless that is the reason why the prosecution did not call Brundidge after having put him on their witness list. (Exh. 1, I-33.) But while Brundidge did not take the witness stand, his hearsay statements became evidence in the case. Witness Clark Lee testified that he based his recollection of defendant's supposed admissions about a propagandistic broadcast upon the notes of Harry Brundidge. (See, VIII-652:11-653:6.) Now the rule is that where hearsay is admitted, it is subject to impeachment just the same as sworn testimony in Court. 3 *Wigmore on Evidence* (3d ed.), Sec. 884, p. 377, says, referring to hearsay admitted in evidence:

“Now, in the same way, the statements being testimonial in their nature, it is proper to subject them,

when admitted to *impeachment in the appropriate ways*, as it was to require the usual testimonial qualifications in advance; and that is what we find the law doing.” (Italics in original.)

Wigmore then enumerates different types of admissible hearsay and shows that they all may be impeached in the usual way. The United States Supreme Court applied this principle to a dying declaration in *Carver v. U. S.*, 164 U.S. 694. There is every reason why all the usual modes of impeachment should apply to hearsay admitted in evidence. By definition hearsay is tested neither by cross-examination nor by the oath. Since two of the usual testimonial safeguards are lacking, it is especially important that all others should be available. Impeachment should therefore be allowed according to the usual rules. Since proof of corrupt activities in the case is an established mode of impeaching a witness who takes the stand it must be equally available against one whose hearsay statements come into evidence. So, since Clark Lee based his testimony upon Brundidge’s notes, proof of Brundidge’s corrupt activities was admissible to impeach those notes. The District Court erred in excluding such proof and the error cannot but be prejudicial.

c. Additional proof of intent in bringing food, etc., to allied war prisoners.

We have already given the reasons why defendant’s aid to Allied prisoners requires a judgment in her favor on the present record. But even were the Court to disagree with us on this issue, the District Court committed reversible error with respect to it. The prosecution was permitted to introduce evidence designed to take the edge

off the proof that the defendant aided Allied war prisoners. Specifically it introduced Exhibit 47 (XXX-3421), a cartoon dated May 21, 1945, in which the Bunka prisoners thank one, Domoto (a guard), for the food which he had brought them from the black market.

But defendant was not allowed to introduce evidence to show that aid to Allied prisoners was actually contrary to the policy of the Imperial Japanese Government. Such proof would show that defendant was really acting against Japan and was not joining in any general practice. Defendant first tried to show on the cross-examination of Kenneth Ishii that when defendant tried to bring food to the Bunka prisoners, she was prevented by the guards: Ishii, XVIII-1856:11-24:

“Q. Were you at any time in the company of the defendant denied admission to Bunka when you were making such visits for that purpose?

A. Yes.

Q. Do you recall by whom you were denied that admission?

Mr. Hogan. Objection, Your Honor: this is going far beyond the realm of the direct examination of this witness.

The Court. Objection sustained.

Mr. Collins. Q. Was there an armed guard that denied you admission?

Mr. Hogan. Objection, Your Honor: improper cross-examination.

The Court. Objection sustained. Let the jury disregard that as having nothing to do with this case.”

Note that while the objection to the last two questions is on the ground of improper cross-examination (untenable) the Court finally sustains it as “having nothing to

do with the case''. This is clearly error; just as the prosecution was allowed to try to soften the effect of defendant's bringing food to the Allied prisoners, she should have been allowed to emphasize it.

Similarly, proof of the systematic starvation of Allied prisoners at Bunka was not permitted even though it would tend to show that her aid to Allied prisoners of war was in opposition to the Japanese government: See XXXVII-4260:9-17, where the point was expressly made and ruled immaterial.

On all these matters, the defendant was prevented from proving her side of an issue while the prosecution was allowed to prove its side. Such rulings constitute a partial denial of her right to hearing and are necessarily prejudicial.

d. Proof of rumors for impeachment.

The prosecution called a string of veterans who testified to their "recollection" as to what they had "heard" the defendant say over the radio (see statements of facts). The defendant tried to show that there were a great many rumors afloat among the armed forces in the Pacific as to things allegedly coming over the radio, but which were not actually being broadcast. The object of this testimony was to impeach this group of prosecution witnesses by showing that they could not distinguish in their own minds between what they had heard over the radio and what they had heard by way of rumor. Almost all such proof was rejected by the trial judge. The following are the transcript references:

Whitten, XXXVIII-4308:17-21—

“A. I heard several stories in Alaska about Tokyo Rose and I—

Mr. DeWolfe. I object to it as hearsay what conversation this witness heard.

The Court. Objection sustained. Let it go out and let the jury disregard it.”

and 4317:6-9—

“Q. Were you informed by anyone while you were at Nanomea that Tokyo Rose was broadcasting?

Mr. DeWolfe. Objected to as hearsay.

The Court. Objection sustained.”

Stanley, XXXIX-4340:4-6—

and 4341:15-4342:4—

Nalini Gupta, XXXIX-4413:21-4414:13—

These passages have already been quoted at appendix pp. 70-74.

This evidence was admissible to impeach the government witnesses who testified from “recollection” as to the “defendant’s broadcasts”. (Fragments of such evidence went in: Whitten, XXXVIII-4330:15-21; Stanley, XXXIX-4355:14-18; Speed, XXXIX-4403:13-25. The Court’s rulings prevented defendant from fully developing this defense.)

Authorities on this point are sparse. 2 *Moore on Facts*, Sec. 823, p. 926 gives the best exposition of the relevancy of such evidence:

“823. Recollection Mixed with Communications from Others.—Lord Brougham said ‘we know that great variations take place in the recollection of individuals not accustomed to business, more especially

after much gossiping talk has been had in the neighborhood upon the subject on which they afterwards gave their evidence;’ and that ‘suggestions of idle or of designing persons get to be mixed up with the recollections, which become fainter and fainter, till at last their own fancy helps to mislead them and they lend themselves to support a false case, possibly without incurring the guilt of forswearing themselves.

“ ‘Some, from defective recollection, will blend what they themselves saw or heard with what they have received from the narration of others,’ said Mr. Justice Field.

“ ‘Chancellor Zabriskie spoke of ‘a warm imagination which makes narrations, often repeated by a good friend, seem as if they were of facts seen by the witness.’ ”

The above quotation by Justice Field is from *U. S. v. Flint*, Fed. Cas. No. 15, 121, 25 Fed. Cas. 1107, 1111; aff’d *U. S. v. Throckmorton*, 98 U.S. 61.

Since the fact of confusing rumors is itself relevant to the witness’s credibility, it is proper to show such rumors as impeaching evidence.

A case applying this principle under slightly different circumstances is *San Antonio Transit Co. v. McCurry*, 212 S.W. (2d) 645, 649 (Tex. Civ. App). There the plaintiff in a personal injury case was allowed to show, not the rumor but the occurrence of another incident of reckless driving to support the inference that defendant’s witnesses had this other incident confused with the one involved in the litigation.

Under the principle stated by *Moore*, supra, the currency of rumors had at least as much tendency to cloud

the recollection of the witness. It was therefore equally competent to prove such rumors.

The error in rejecting this line of impeachment was obviously prejudicial. The impeachment was directed at *ten prosecution witnesses* (*G. Velasquez, Sherdeman, Sutter, Hoot, Cavanar, Thompson, Gilmore, Cowan, Hall, Henschel*, see App. pp. 2 to 6) who gave up some of the most damaging testimony against appellant. Refusing to allow the defendant to impeach their credibility in this important way requires a new trial.

e. Proof of other broadcasts.

The prosecution offered evidence of broadcasts ranging on Tokyo time from 3:00 P.M. (*Hoot*, XX-2136:24-2137:2, 2142:15-17, Gilbert Islands 6:00-7:00 P.M.) to midnight (*Henschel*, XXVI-2960, 2988; Leyte 9:00-11:00 P.M.). See summary of these witnesses, App. pp. 2 to 6.

The defense, however, was usually limited to rebuttal testimony covering only the hour 6-7 P.M., Tokyo time. Among other things the Court excluded evidence of the contents of the broadcasts of Myrtle Liston, who broadcast from Manila. The purpose of this evidence was to show that the government witnesses were listening to this program when they thought they were listening to the defendant. It is clearly relevant under the principle of *San Antonio Transit Co. v. McCurry*, 212 S.W. (2d) 645, *supra*. The excluded broadcasts of Myrtle Liston appear in the deposition of Ken Murayama, her script writer and master of ceremonies (K. Murayama, R. 847-8):

(See Appendix p. 81.)

Other witnesses were likewise stopped from testifying to Japanese broadcasts occurring at other hours than 6-7

P.M. Tokyo time. See Schenk, R. 514-16; Matsui, R. 618-621, and particularly 645-6; Welker, XXXVIII-4387 (def. Exh. Z for Identification); Gallagher, XXXIX-4376-7, 4380-85; Cox, XXXVII-4262:17-20; Whitten, XXXVIII-4398:8-13. Mrs. Kanzaki was prohibited from testifying to the contents of Berlin broadcasts (XLI-4583:12-19) although she was later allowed to give one item from the Tokyo German hour (Kanzaki, XLI-4586:7-17).

On the motion for bail pending appeal the government argued that in some instances defendant was permitted to introduce evidence as to broadcasts at other hours than 6-7 P.M. Tokyo time. But that is no answer. The prosecution was unreservedly allowed to give evidence of alleged broadcasts *over a nine-hour stretch*; the trial Court largely limited the defendant's rebuttal to only one hour. *Defendant was never allowed to counter the full range of the prosecution's proof.* That is obviously a denial of a fair trial.

f. Defendant's citizenship.

As already pointed out, the United States authorities classified the defendant as an American citizen only when they wanted to prosecute her for treason. Some evidence to this effect went in but more was kept out. It was relevant *first* on the issue of defendant's citizenship: if the government itself had doubts about defendant's status it could not ask the jury to find on the issue beyond a reasonable doubt. *Second*, it showed the harassing and unfounded character of the prosecution: the government labeled defendant with whatever citizenship might give a color of an excuse to oppress her. This parallels the "unnecessary hardships and cruelties" inflicted on the

Nisei in the United States, *Acheson v. Murakami*, 176 F. (2d) 953, 954. Martin Pray, defendant's guard at Sugamo prison in 1945-6 was called to testify that the American authorities did not then classify her as an American citizen; but on the contrary gave her the jail routine accorded to *Japanese* prisoners. See Pray, XLIII-4706:19-4708:10; *offer of proof* at XLIII-4719:6-16.

A similar attempt was made when Phil d'Aquino, defendant's husband, took the stand. His testimony was likewise rejected. See Phil d'Aquino, XLIII-4818:19-4819:16—*offer of proof*, XLIV-4849:5-15 (defendant treated as *Portuguese* after her release from prison in October, 1946).

The same thing happened in the examination of the defendant herself. See Defendant, XLVII-5208:20-5209:14, also XLVII-5225:3-5226:13.

Since these rulings amounted to an exclusion of the government's own doubts upon a subject which it had to prove beyond all reasonable doubt, the error was prejudicial.

2. DENIAL OF OFFERS OF PROOF.

We have already quoted the transcript where the trial judge and prosecutor united in their idea that offers of proof were unauthorized and improper. See p. 90, *supra*.) The trial judge repeated his position at various stages of the trial. For instance, at XLVII-5211:14-17 he volunteered:

“The Court. Now just a moment. The court has indicated to you clearly that it cannot accept an offer of proof. You are limited to the witness on the stand and you may examine her on any matter that you see fit.”

We have also shown that on the second occasion when the matter came up defense counsel asked to make their offer of proof in the absence of the jury and were told to make it in the presence of the jury. (See p. 99, *supra*.) Frequently, we managed to get some semblance of offer of proof into the record; but at other times the defense was wholly frustrated. *This section of the brief deals only with the instances where defense counsel were prevented from making any offer of proof at all.* It occurred at the following places in the transcript:

XXXV-3957:22-3958:6 (*all disputed questions in Reyes' testimony*);

XXXVII-4291:3-4292:9, XXXVIII-4293-4303, see for example, XXXVIII-4296:10-14, 4302:17-4303:3 (*almost the entire testimony of Kalbfleisch*);

XXXIX-4341:22-4342:4 (*Stanley—rumors confusing recollection of witnesses*);

XLVII-5201:5-5203:2 (*Defendant—while imprisoned in 1945-6 demanded of the authorities copies of charges, counsel, speedy trial—fragments of this material later came in*).

Since an offer of proof is necessary on direct examination (see cases p. 90, *supra*), it is error to refuse leave to make one. See the following authorities: 38 *Cyc.* 1330; 64 *C. J.* 123, sec. 139; *Maxwell v. Habel*, 92 Ill. App. 510, 512; *Spitzer v. Meyer*, 198 Ill. App. 550; *Fid. & Cas. Co. v. Weise*, 80 Ill. App. 499 (rev'd other grounds, 182 Ill. 496, 55 N.E. 540); *Ehrhardt v. Stevenson*, 128 Mo. App. 476, 106 S.W. 1118, 1120; also *State v. Irwin*, 17 S. Dak. 380, 97 N.W. 7, 10, and *Thomas v. D. C.*, 90 F. (2d) 424, 428 (App. D.C.).

Because the erroneous rulings of the trial Court were highly prejudicial to the defendant we wish to point out that the judgment must be reversed under the following rules:

Error is presumed injurious unless it appears beyond doubt that it did not and could not cause prejudice.

Parlton v. U. S. (C.A.-D.C.), 75 Fed. (2d) 772, 776.

Error is presumed to be prejudicial and to require a reversal where record shows error but does not disclose whether error is prejudicial or not.

Ah Fook Chang (C.C.A.-9), 91 Fed. (2d) 805, 810;

Little v. U. S. (C.C.A.-10), 73 Fed. (2d) 861, 866-7.

Where errors committed by trial Court are fundamental the reviewing Court cannot affirm even if it is without doubt of defendant's guilt.

Meeks v. U. S. (C.C.A.-9), 163 Fed. (2d) 598, 602.

Denial of leave to make an offer of proof is *an error which prevents the defendant from showing the prejudicial effect of an earlier ruling*. Such an error *per se* requires reversal of the judgment. The reasons for this were given by the Supreme Court of California, in *People v. Stevenson*, 103 Cal. App. 82, 93, 284 P. 487:

(See Appendix p. 82.)

Followed in *People v. Sarrazawski*, 27 Cal. (2d) 7, 19, 161 P. (2d) 934.

3. ERRORS ON EXAMINATION OF PROSECUTION WITNESSES.

The following erroneous rulings on evidence occurred during the examination of witnesses for the prosecution:

a. **Limitation of Lee's cross-examination.**

(1) Clear error was committed in limiting defendant's cross-examination of witness Clark Lee. Defense counsel tried to question him upon a statement appearing in his book 'One Last Look Around'. (Duell Sloan & Pearce, 1947; on page 84 he says "Tokyo Rose's programs were at least entertaining our troops".) The record proceeded as follows:

Lee, VIII-588:18-25:

"Q. You recall, Mr. Lee, stating in your book, 'One Last Look Around,' comparing the broadcasts of the defendant with those of Mother Topping, that Tokyo Rose programs were at least entertaining to our troops and there the parallel ends?

Mr. DeWolfe. I object to that as not proper cross-examination, hearsay. Now he is going into a book, based on hearsay.

The Court. The objection will be sustained."

This was legitimate impeachment. On the stand Lee testified the defendant said she saw the purpose of the Zero Hour "was to make them homesick and unhappy about sitting in the mud". (*Lee*, VII-483:25-484:2); he gave only qualified testimony about entertainment (*Lee*, VIII-563:23-564:3.) The prosecutor's objection was that the statement in the book is based on hearsay, but *an impeaching statement is admissible even though it may be based on hearsay*. See:

3 *Wigmore on Evidence* (3d ed.) Sec. 1040, p. 728, "Tenor and Form of the Inconsistent Statement * * *

(4) The utterance may be in form of a *joint statement* by the witness, signing a document with other persons. If the statement did not accurately express

his own belief, he may absolve himself by explanation.” (*Italics in original.*)

(Lee’s book, of course, was over his own name, alone.)

A case directly in point is *Healy v. Wellesley & B. St. Ry. Co.*, 176 Mass. 440, 57 N.E. 703, in which a witness was impeached through a time book *prepared by others*. The Court says:

(p. 703) “Whether the entries were actually made by Michael Healy or not was immaterial. His act in turning the book in as the record of the time worked by the men in his gang amounted to a representation that they had worked the time therein set down, and, as such, evidence of the entries was admissible to contradict him.”

The same is true of statements in Clark Lee’s book. They amount to a representation that things are as he says they are; and so may be used to contradict him whether based on first or second hand knowledge.

Followed in: *Eureka Hill M. Co. v. Bullion B. & C. M. Co.*, 32 Utah 236, 90 P. 157, 160; *Steffen v. S. W. Bell Tel. Co.*, 56 S.W. (2d) 47, 49 (Mo.); *State v. Harris*, 64 S.W. (2d) 256, 259 (Mo.).

Since this was an error on a vital issue—whether defendant’s programs helped the Americans or the Japanese—it was undoubtedly prejudicial. *Alford v. U. S.*, 282 U.S. 687 was reversed for disallowance of one important question on cross-examination. *Reilly v. Pinkus*, 94 L. Ed. Adv. Ops. 79 was reversed because the petitioner was not allowed to cross-examine medical witnesses on statements appearing in certain medical books. Limitation of Lee’s cross-examination in itself requires a reversal.

(2) Cross-examination of Lee was further limited as follows (*Lee*, VII-553:22-554:12):

“Q. Mr. Lee, you are acquainted with Colonel Fred Munson?

A. Yes, sir.

Q. And you met Colonel Fred Munson—withdraw that.

You had known Colonel Munson for a number of years prior to the war, hadn't you?

A. Yes, sir.

Q. You met him in Tokyo some time in early September of 1945, isn't that right?

A. I did, yes.

Q. Didn't Colonel Munson tell you at the time you met him in Tokyo that 'Tokyo Rose' was a Canadian girl?

A. He did.

Mr. DeWolfe. Just a minute. I move to strike that out. Don't answer, Mr. Lee, until I have a chance to object. Object to it as hearsay and move to strike it out.

The Court. The objection will be sustained.”

The fact that anyone *should have said* that “Tokyo Rose” was Canadian was competent to impeach the original identification of defendant through witness Eisenhart. It is not within the hearsay rule because it is *not offered to prove* that “Tokyo Rose” *was Canadian* but to show *the fact that a listener took her to be a Canadian*. This goes directly to the question of identification: regional differences in accent make it unlikely that anyone born and raised in California would be taken for a Canadian. The evidence should have been admitted for that purpose.

(3) Cross-examination of Lee was again limited with respect to the circumstances under which Lee took the statement later introduced as Exhibit 15 (*Lee*, VIII-625:17-626:1):

“Q. As a matter of fact, she could not obtain counsel, that is to say, an attorney authorized to practice law in the United States.

Mr. Hennessy. I object to that. There is no law refusing counsel to anybody. That only applies to court proceedings as stated in the Johnson case——

Mr. Collins. This goes directly to the rule as announced——

The Court. Read the question.

(Question read.)

The Court. Objection sustained.”

Opportunity to obtain counsel is a *relevant factor* in deciding whether a confession is voluntary. The Supreme Court has repeatedly so held. See *Watts v. Indiana*, 338 U.S. 49, 53, 55, 57, 59; *Turner v. Pennsylvania*, 338 U.S. 62, 67; *Harris v. So. Carolina*, 338 U.S. 68, 70, 71, 73.

b. Limitation of Henschel's cross-examination.

Defendant was likewise unduly limited in cross-examining *Henschel*. At XXVI-2969:7-11:

“Q. Did you write any newspaper articles concerning the defendant?

A. Concerning the defendant?

Q. Yes.

A. I have.”

and 2970:16-22:

“Q. What year were they written?

A. This year.

Q. When you wrote these articles you had an opinion as to the guilt or innocence of the defendant, hadn't you?

Mr. DeWolfe. I object to that as highly improper, Your Honor.

The Court. The objection is sustained."

It is always permissible to cross-examine a witness on his bias or preconceived opinion against the defendant. If the witness had an opinion on the defendant's guilt when he wrote the articles he presumably still had it when he testified. Wigmore states the general principle, and almost cites our question as a typical example. 3 *Wigmore on Evidence* (3d ed.) sec. 940, p. 493:

"* * * the force of a hostile emotion, as influencing the probability of truth-telling, is still recognized as important; and a partiality of mind is therefore always relevant as discrediting the witness and affecting the weight of his testimony.

"* * * Where it is thought worth while, however, there is no objection to a direct question, 'Are you not anxious to have the defendant convicted?'

"* * * A *partiality* of mind at some *former time* may be used as a basis of an argument to the same state at the time of testifying; though the ultimate object is to establish partiality at the time of testifying." (Italics in original.)

Cases involving "*a desire to have the opponent defeated*" are collected in 3 *Wigmore on Evidence* (3d ed.) sec. 950, notes 4 and 5. In *Sunderland v. U. S.*, 19 F. (2d) 202, 212, the Eighth Circuit held it reversible error to refuse cross-examination as to whether a government witness had been coaching other government witnesses. This was an *indirect* manifestation of *past desire to see the*

defendant convicted. We asked Henschel *directly* whether he had such bias. Cutting off this cross-examination at the threshold was prejudicial error under *Sunderland v. U. S.*, 19 F. (2d) 202, 212, and *Alford v. U. S.*, 282 U.S. 687, *supra*.

c. Foundation for Moriyama's testimony.

Moriyama was asked to testify to alleged statements of defendant over the Radio Tokyo microphone. The time for these statements was fixed only as being "between May, 1944 and September, 1945"—a period of 16 months. (*Moriyama*, XXIV-2551:1, 2552:25.) Defendant objected at the trial and submits now that a *16 months' period* is much too vague to serve as foundation to admit an incriminating statement. We print this passage in the appendix. (*Moriyama*, XXIV-2550:13-2551:10, 2551:21-2552a:15. App. p. 83.)

d. Other errors in Government's evidence.

(1) The following passage in the *direct* examination of Mitsushio is open to the objection that it constitutes cross-examination by the prosecution of its own witness:

Mitsushio, XIII-1325:19-1326:21. (See App. p. 85.)

(2) The prosecution tried to prove by Kenneth Ishii that the defendant was aware of propagandistic broadcasts on the Zero Hour. The witness was allowed to give the following generalized, summary evidence:

Ishii, XVII-1829:10-14. (See App. p. 86.)

The objections that this was too general and constituted the conclusion of the witness should have been sustained.

(3) The following occurring on the redirect examination of Clark Lee speaks for itself:

Lee, VIII-601:1-10. (See App. p. 87.)

(4) On the recross-examination of *Nii* defense counsel repeatedly tried to question him about his drinking habits. This was objected to and excluded on the ground of improper cross-examination. Since the redirect examination had dealt with this testimony as to alleged drinking at an interview he had with defense attorney Tamba, the recross was certainly within the scope of the redirect. The redirect had gone into the subject; moreover, the fact that *Nii* was a heavy drinker would explain why drinks were made available to him at the interview. In the appendix we give both the redirect testimony and the questions which were ruled out on recross. *Nii*, XXV-2733:11-2735:6, XXV-2736:21-2737:19. (App. pp. 87-90.)

Thus limiting the recross examination was prejudicial—certainly when added to all the other errors of the trial.

(5) *Villarin* testified on direct examination that he visited Radio Tokyo in 1944; that he had been sent to Japan by the Japanese army for indoctrination (*Villarin*, XXVI-2850:14-20.) On cross-examination it was developed that he had gone to Japan under threats against his life (*Villarin*, XXVI-2858:14-17) but the defense was not allowed to show who made the threats (*Villarin*, XXVI-2858:18-21):

“Q. Can you tell me what Japanese officer made those threats against your life?”

Mr. DeWolfe. Objected to as not proper cross-examination.

The Court. The objection is sustained.”

The identity of the person is a specific detail of a subject which had been opened generally by the prosecu-

tion. Defendant should have been permitted to ask the question.

(b) Hall testified that he supposedly heard the defendant over the radio while he was at various places in the neighborhood of New Guinea. (*Hall*, XXVI-2885ff.) Defendant was not permitted to cross-examine him on the point whether there were not other Japanese stations much closer to New Guinea than Tokyo—and which he might have heard instead. We quote this passage in the appendix. (*Hall*, XXVI-2942:4-2944:11; App. p. 90.)

It was certainly proper to show the presence of Japanese broadcasting stations within much closer range than Tokyo, to impeach the witness' identification of a broadcast as coming from Tokyo.

(7) Finally at XVII-1818, XVIII-1847, the Court itself put into evidence sections of (what is now) Exhibit 25 *which were not offered by the prosecution* nor by the defense. The odd pages are not identified by any witness because the prosecution withdrew them before questioning its witness. *Both sides objected to this portion of the present exhibit.* We print the passage in the appendix—XVII-1818:8-1819:25. (App. p. 92.) XVIII-1847:4-20. (App. p. 94.)

(8) *Denial of Public Trial.*

Government Exhibits 16-21 consisted of phonograph records supposedly made by persons monitoring defendant's broadcasts. (Their text is contained in Exhibit 25.) When played they were inaudible without earphones. Earphones were provided for the judge, jury, clerk, reporter, defendant, counsel and members of the press, *but not for the*

public spectators in the courtroom. Defendant objected that this procedure deprived her of a public trial in violation of the VIth Amendment. (XIX-2016-18.) Nevertheless, the exhibits were played out of the hearing of the public. In effect this amounted to excluding the public from one stage of the trial. This contention was overruled in *Gillars v. U. S.*, slip opinion, pp. 14-15. It cites no authorities but decides on "common-sense". The common sense of the situation is that the public was in no better position with respect to these records than if it had been observing the proceedings through a glass door. It could see the persons in the court room, *but could not hear the evidence—the most important part.* It was not even claimed that earphones for the public could not have been installed. Under the circumstances shutting out of six exhibits was *pro tanto* a denial of a public trial in violation of the Sixth Amendment. See *Davis v. U. S.* (C.C.A. 8), 247 Fed. 394; *U. S. v. Kobli* (C.C.A. 3), 172 Fed. 919, and *Tanksley v. U. S.* (C.C.A. 9), 145 Fed. (2d) 58.

(9) *Exhibit 75.*

Exhibit 75 (dated June 12, 1945) contained almost nothing claimed to have been said by defendant. The parts uttered by others were offered to rebut "the defendant's contention, and * * * testimony that no propaganda was broadcast on the Zero Hour and that it was an entertainment program." (LII-5859—one broadcast in 340—see I Arg. 20 for number of programs: *the monitoring station at Hawaii kept a permanent file of the Zero Hour, which file was not produced*, LII-5866, 5886-7.) But statements uttered by others are hearsay as to defendant unless (a) they were made in her presence or (b) they were made

with her knowledge or (c) at least, they were typical of a series of statements made with her knowledge. No attempt was made to lay any such foundation or any foundation. Over objection the statements of third persons were admitted against defendant. (Witnesses on both sides had testified without contradiction that after May 1944 defendant did not usually stay during the whole program, but left as soon as her part was finished. IX-787:21-788:13; XLV-5012-13.)

(10) “*Confidential*” *Exhibits on Rebuttal.*

F.B.I. agents Tillman and Dunn were called in rebuttal to testify about the manner in which they took statements from the witness Reyes, including the question whether Exhibits 52 and 54 were complete and correct accounts of what he told them. On cross-examination it developed that at least one other statement had been taken, and that it was apparently included in a report made by the agents to members of the Attorney General’s staff. (LI-5784:20-5785:4, 5839:13-22.) The government refused to produce these documents on the ground that they were “confidential”. (LI-5786-93, 5839-40.) (Tillman had previously perjured himself by denying the existence of this statement; see *Tillman*, LI-5758:14-5759:4; LI-5784:10-16.)

Two questions arise on this point. The first is whether 5 U.S.C. 22 (on which the government based its objection, LI-5788, 5790) is relevant at all; the *second* is whether the government has not in any event waived the objection by eliciting direct testimony on the subject.

(a) 5 U.S.C. 22 says nothing about confidential evidence. It merely gives executive department heads author-

ity to prescribe regulations “*not inconsistent with law*” for the conduct of their departments. The very phrase “not inconsistent with law” indicates they are not given power to modify the ordinary rules of evidence.

Certainly *ex parte* regulations modifying the rules of evidence cannot have any validity in criminal cases. Conceding, for purposes of argument, that such regulations may bind civil litigants (*Boske v. Commingore*, 177 U.S. 459; *Ex parte Sackett*, 74 F. (2d) 922), it would be contrary to every element of fair play to allow them to be used in a criminal case. For if departmental regulations could change the rules of evidence, the government would have power to make and unmake rules of evidence in its own favor in cases to which it is a party. Certainly, the whole system of criminal evidence is not intended to be subject to that kind of unpredictable change. For the government thus to alter the rules of evidence at will in cases to which it is a party, would raise serious questions of due process. Statutes are to be construed to avoid raising serious constitutional questions, if possible. (*U. S. v. C.I.O.*, 335 U.S. 106, 120-121.) Upon this basis, the phrase “*not inconsistent with law*” in 5 U.S.C. 22 must be construed as withholding authority to change the rules of evidence in cases to which the United States is a party. So held in *U. S. v. Andolscheck*, 142 F. (2d) 503, 506 (C.C.A. 2); *U. S. v. Beekman*, 155 F. (2d) 580, 584 (C.C.A. 2); *U. S. v. Ragen*, 180 F. (2d) 321, 326 (C.A. 7); *U. S. ex rel. Schlueter v. Watkins*, 67 F. S. 556, 561, *affd.* 158 F. (2d) 853.

Apart from this section, the mere fact that a statement taken by an investigator and is turned over to the United

States Attorney does not make it confidential. (cf. LI-5787:6-13.) Suppression of the report was therefore error.

(b) Furthermore, the government waived any claim of "confidential matter" when it elicited direct testimony from Tillman and Dunn. Conceding for purpose of argument that the report could not have been demanded originally, the situation changed when the government put on direct testimony within the scope of which the report fell. The government's position is analogous to that of a defendant: the government cannot call him, but if he takes the stand it can cross-examine him within the scope of his direct. The government cannot have its cake and eat it, too: get the benefit of the direct testimony and then throttle cross-examination on the ground that what it brings forth is "confidential". (*U. S. v. Krulewitch*, 145 F. (2d) 76, 79 (C.C.A. 2).) See, also, cases cited in previous section and 8 *Wigmore on Evidence* (3d ed.), Sec. 2378 a, especially pp. 789-98 showing the lack of justification for the "official secrets" privilege.

(11) *Summary.* The foregoing errors during the government's evidence require a reversal, either standing alone or in conjunction with the numerous errors previously discussed.

4. ERRORS ON EXAMINATION OF DEFENSE WITNESSES.

a. **Exclusion of impeaching reputation evidence by Founy Saisho.**

The defense asked Founy Saisho to state the reputation for truth, honesty and integrity of the prosecution

witnesses Mitsushio, Oki and Ishii. The District Court did not let her answers go to the jury (Saisho, R. 407-408):

(See Appendix p. 94.)

The reputation of Oki is referred to "this community", which sufficiently identifies it as the community in which Oki lived. The deposition was taken in Tokyo, Japan (R. 399); before it was read Oki testified that he resided in Tokyo. (*Oki*, IX-658:6-7.) The questions relating to Ishii and Mitsushio, though more general in form, are evidently directed to the same locality. Both had testified before the reading of the deposition that they lived in Tokyo. (*Mitsushio*, XI-987:12-19; *Ishii*, XVII-1821:12-13.)

A witness can always be impeached by evidence of a bad reputation for truth, honesty and integrity in the community in which he lives. 5 *Wigmore on Evidence* (3d ed.), Sec. 1615, pp. 486 ff.; *Sawyeer v. U. S.*, 27 F. (2d) 569, 570 col. 2 (C.C.A. 9); *Swafford v. U. S.*, 25 F. (2d) 581, 584.)

Refusal to allow any questions upon this subject was palpable error. As to Oki, at least, Miss Saisho's answer was highly damaging. Rejection of her answers as to all three witnesses was prejudicial.

b. Appeals to race prejudice in cross-examination of defense witnesses.

(1) While the prosecutors claimed defendant to be American when they appealed to law in order to convict her of treason, they called her Japanese when they appealed to prejudice (*Ince*, XXXI-3543:14-3544:1):

"Q. Now, the defendant was not the only Japanese with whom you were friendly, was she?

A. Would you restate the question, please?

Q. I said, the defendant was not the only Japanese with whom you were friendly, was she?

Mr. Collins. I object to that on the ground it is highly improper. There is no evidence in here whatsoever that the defendant is Japanese.

Mr. Knapp. I am cross-examining.

The Court. Read the question, Mr. Reporter.

(The reporter read the last question.)

The Court. He may answer. The objection will be overruled.

A. I don't feel that I was friendly with any Japanese, ever."

(2) In the following questions asked of *Reyes about Ince* the prosecution tried to appeal to whatever prejudice any juror might have against interracial marriages (Reyes, XXXII-3705:20-3707:5):

(See Appendix p. 95.)

c. **Errors on direct examination of defendant.**

(1) At XLVI-5161 the defendant was not permitted to testify that she was told her voice was nothing like that which the speaker had heard in the South Pacific. As already stated, the reactions of listeners are relevant on the question of identification. In this instance we have an expression of reaction of a man upon hearing the defendant's voice for the first time—a clear example of *res gestae*. The record reads as follows (Defendant, XLVI-5160:7-17, 5161:5-18):

(See Appendix p. 97.)

Exclamations following *immediately* upon some exciting cause are always admissible as *res gestae*. The theory behind them was clearly expounded by the Supreme Court

of Arizona in *Keefe v. State*, 50 Ariz. 293, 72 P. (2d) 425, quoted at length in 6 *Wigmore on Evidence* (3d ed.), Sec. 1745, pp. 132-3.

The following sentence is noteworthy (72 P. (2d) 425, 427):

“A spontaneous exclamation may be defined as a statement or exclamation made immediately after some exciting occasion by a participant or spectator and asserting the circumstances of that occasion as it is observed by him.”

The present case obviously satisfied the requirement of immediacy: the interview between defendant and the newspaper correspondent *was still in progress* when the remark was made. The above quotation also shows that the rule is not limited to “exclamations” as the term is used *in grammar*. The *legal* meaning of a “spontaneous exclamation” is “*statement or exclamation made immediately after*” etc. It is therefore no objection that grammatically the Australian correspondent’s remark is properly terminated with a period rather than an exclamation point. It definitely satisfied the above formula and should have been admitted.

Federal cases upon the same subject are as follows:

Standard Acc. Ins. Co. v. Heatfield, 141 F. (2d) 648, 651 (C.C.A. 9); *Overland Construction Co. v. Snyder*, 70 F. (2d) 338, 338-9 (C.C.A. 6); *William C. Barry, Inc. v. Baker*, 82 F. (2d) 79, 81 (C.C.A. 1). Some of the above authorities say that the statement “must relate to the main event”; that requirement is satisfied here. Rejecting this evidence on negative identification was prejudicial error.

(2) At XLVII-5224:1-22 defendant is not permitted to testify to conversations with Brundidge immediately following the signing of Exhibit 15. From General Headquarters where defendant signed the exhibit, she, Hogan and Brundidge went over to the Radio Tokyo broadcasting rooms and thence to the Dai Ichi Hotel. Part of the time defendant and Brundidge were together without Hogan's presence. The Court ruled out as hearsay all conversations during that time.

We have already made the point that there is *prima facie* evidence that Brundidge was acting on behalf of the United States when he took the trip to Japan with Hogan. Taking the admitted (Department of Justice paid fare) and excluded (Exh. BV identification—Brundidge's passport) evidence together, the evidence is certainly sufficient on that issue. Since Brundidge was acting on behalf of the United States, defendant's conversations with him were not hearsay, and should have been received.

(3) At XLVII-5209:15-5212:15 the defendant tried to testify that when she was released from custody in 1946 Major Swanson, one of the authorities in charge of the prison, told her the release was with the consent of the Justice Department. The passage is set forth in the appendix, p. 98.

Since Major Swanson was her jailor and was identified as one of the American authorities, his statements are the statements of an agent of the United States, and therefore not hearsay. The evidence should have been admitted.

d. **Errors on examination of miscellaneous defense witnesses.**

(1) Although the prosecution asked about Ince's *private* life on the pretext that it had "some bearing on the witnesses and their relation, and so on" (XXXII-3706:6-7), it objected even to an account of his *military activities* just prior to his capture. Certainly the military duties which Ince performed when he was captured could properly be shown as a background for his testimony of events *after* he was captured. The following ruling was therefore error (Ince, XXXI-3498:13-25):

"Q. Were you assigned any special duties while you were in the Philippines?

A. Yes, sir, I was taken into the army as the chief censor in the Censorship Branch of General MacArthur's headquarters as pertained to all commercial radio broadcasting in the Philippines.

Q. Pursuant to your duties then, did you run *The Voice of Freedom*?

Mr. Knapp. Objection, Your Honor, as to what happened at Corregidor. I think the preliminary questions covered it fully. It has no relation or bearing on the issue of the defendant's guilt or innocence.

The Court. *The objection will be sustained.*"

(2) We have already noted the prosecutor's misstatement of the record in connection with the cross-examination of Miss Ito. At other times he stated the record correctly—that she had not testified to any conversations with defendant about her radio work—but nevertheless insisted on "cross-examining" Miss Ito upon such conversations. We quote the passage in the appendix. (Ito, XL-4527:16-4529:2, App. p. 100.)

The prosecutor himself admits that there was no testimony regarding conversations about announcing: the

cross-examination is therefore patently improper. Apparently the prosecutor himself sensed this since shortly afterwards he made the *untrue* statement that the direct examination *had* dealt with conversations about broadcasting. (XL-4529:22-3.)

(3) The following was likewise improper cross-examination in Miss Ito's testimony (Ito, XL-4532:2-13):

"Q. She told you that she liked it because it was better pay than a typist received at Domei, didn't she?

Mr. Collins. I submit that is incompetent, irrelevant, immaterial.

Mr. DeWolfe. It is highly material.

Mr. Collins. It is highly improper cross-examination.

The Court. The objection is overruled. Read the question.

(Question read.)

The Witness. The pay was definitely better.

Mr. DeWolfe. Q. Did she tell you that—not whether it was better, but did she tell you that?

A. Yes."

(The direct examination of Miss Ito dealt solely with becoming stranded in Japan and the defendant's expressions of feeling as between the United States and Japan.)

(4) For the same reasons the following was improper cross-examination of Miss Ito (Ito, XL-4538:20-4539:7):

(See Appendix p. 101.)

This practice of developing new matter on the cross-examination of Miss Ito was especially reprehensible since the prosecution had her under subpoena as its own witness. (Exh. CC, XL-4544.) Anything which the prosecutor wished to ask her he could ask her—under the rules governing *direct examination*. What the prosecutor did, how-

ever, was to develop part of his own case *in defiance of the restraints of direct examination*. That he should even attempt to do so gives a measure of the spirit of unfairness with which the prosecution approached the case.

(5) At XLIII-4711:11-4712:4 the witness Martin Pray was not allowed to testify that defendant was held incommunicado at Sugamo Prison:

(See Appendix p. 102.)

Defendant herself testified to this fact: the above ruling deprived her of impartial corroboration. We have already shown that being held incommunicado hindered defendant from gathering and preserving evidence and therefore had a bearing on denial of a speedy trial.

e. Errors in the cross-examination of Reyes.

Reyes was subpoenaed by both sides. (Reyes, XXXIII-3715:1-3; Def. Ex. V, XXXIV-3942 is the government's subpoena.) He had previously given two statements to the F.B.I. (Exhibit 52, XXXIII-3741 and 54, XXXIII-3825.)

He took the stand on behalf of the defendant. His cross-examination was almost wholly directed toward impeaching him with Exhibits 52 and 54.

Instead of using those documents legitimately, however, the prosecutor brought them into the case with every variety of improper question.

(1) The most serious of these involve repeated misstatement of the record and suggestion to the witness that he testified to something which he never said (Reyes, XXXIII-3748:21-3749:12):

“Q. And you testified here Friday under oath and this morning that everything you told the agents was true, didn’t you?

A. (hesitating).

Q. Didn’t you, or can’t you remember now?

A. Yes, I did, sir.

Q. *And you testified here a few minutes ago that everything in exhibit 52 was true, didn’t you, Reyes?*

Mr. Collins. Just a moment, please. I submit, if your Honor please, it is argumentative.

The Court. The objection will be overruled, he may answer.

Mr. DeWolfe. Q. Didn’t you, Reyes? Didn’t you so testify?

Mr. Collins. Just a moment, let the witness answer the question.

The Court. Answer the question.

A. I believe I did, sir.”

The prosecutor knew the difference between testifying that what Reyes had told the agents was true and testifying that *the contents of Exhibit 52* were true. He falsely put the latter statement into Reyes mouth—*until then Reyes had testified only that what he told the agents was true*. The suggestion (XXXIII-3749:1-2) about the truth of Exhibit 52 was improper and constitutes misconduct such as mentioned in *Berger v. U. S.*, 295 U.S. 78, 84 (“misstating the facts in his cross-examination of witnesses”). At XXXIII-3751:16-3752:13 the prosecutor (over objection) then gets Reyes to “admit” that this “testimony” is “false”—i.e. gets the witness to admit the “falsity” of “*testimony*” *which he never gave*. This reference to *supposed testimony which was never given* is repeated once more at XXXIII-3753:13-3754:13.

Under *Berger v. U. S.*, 295 U.S. 78, 84, three references putting words into a witness' mouth and then charging him with falsity on what he never said, is certainly reversible error.

(2-4) Other errors consist largely in argumentative questions and in trying to introduce the opinions and conclusions of Exhibits 52 and 54 as *independent evidence*. (We have already noted the law on this phase: the impeaching document itself need not satisfy the requirements of testimonial evidence, but when the witness is asked to give *independent evidence on the subject* his testimony must meet the same requirements as testimony on any other point.)

This type of question starts at XXXII-3691:18-3692:2:

“Q. And you were easily influenced?”

Mr. Collins. I submit, if your Honor please, that is highly improper cross-examination and it is argumentative and speculative, asking for the opinion and conclusion of the witness.

The Court. Read the question.

(Question read.)

The Court. He may answer the question. The objection is overruled.

A. In certain matters, yes.”

This question clearly calls for a conclusion and is argumentative. Immediately afterwards the prosecutor read a series of conclusions from Exhibit 52 and asked whether the passage was “true or false”. (XXXIII-3744:20-3746:5.) Since this takes the impeaching statement *pro tanto* into the realm of substantive evidence, it is subject to the objection that it calls for a conclusion.

(5) Again at 3747:6-3748:9 (App. p. 240), the objection should have been sustained that the questions are argumentative.

(6) XXXIII-3769:20-3771:6. This passage is set forth in the appendix. It is a highly improper mode of examination—asking about the “falsity” of the contents of a document which is not produced, not put into evidence, nor even shown to the witness. (App. p. 104.)

(7) At XXXIII-3776:5-17 the prosecution asks the witness about the nature of the contents of Exhibit 53—over the objection that the document speaks for itself. (It is introduced at XXXIII-3778.) The passage is set forth in the appendix and is subject to the objection which was made. (App. p. 105.)

(8) At XXXIV-3840:13-21 we have the following:

“Mr. DeWolfe. Q. Does this document that I have handed to you appear to be a script of the Zero Hour program and an accurate one of the Zero Hour program on November 17, 1943?

Mr. Collins. I object to that on the ground it is calling for the opinion and conclusion of the witness and calls for nothing but hearsay.

The Court. If he knows, he may answer. The objection may be overruled.

A. I do not know.”

The question clearly calls for a conclusion. (It is also compound and complex.)

(9) In a supposed attempt to impeach Reyes, the prosecutor repeatedly read him *purported* scripts and asked whether Reyes had broadcast the material which they supposedly contained. *In most instances Reyes de-*

nied it. (Reyes, XXXIV-3837:8-19, 3838:5, 3841:11-25; 3843:9-3844:20; 3858:22-3859:3; 3859:22-3860:12; 3861:8-3862:8; 3862:18-3863:10; 3864:13-3865:14; 3865:20-3866:7.)

The questions were relevant, if at all, only as foundation questions for impeachment. But in none of the above instances did the prosecution follow up with any proof that Reyes (or any one) had actually broadcast the material which was thus brought before the jury. It is certainly not unreasonable to infer that this was intentional misconduct, in that the prosecutor insinuated matters to the jury which he knew he could not prove. *But since the questions were valid only as foundation for impeachment, they became legally incompetent when the impeaching evidence was not offered. The Court should so have instructed the jury on its own motion.* When evidence which is only conditionally admissible is not followed up, the Court must, of its own motion instruct the jury to disregard it. See *Morrow v. U. S.*, 11 F. (2d) 256, 260 (C.C.A. 8), testimony of alleged co-conspirator admissible only if followed by proof of the conspiracy, which was not offered. The same case holds failure to give such an instruction to be reversible error. No specific instruction was given here.

(10) At XXXIV-3868:6-24 and again at XXXIV-3869:19-3870:8 the prosecutor was permitted to ask whether certain photostats “purport” to be Zero Hour scripts—an obvious call for a conclusion. The passages are set forth in the appendix. (Appendix, p. 105.)

III.

CONCLUSION.

For the reasons stated in Part I of this brief, we submit that the judgment should be reversed with directions to discharge the defendant. Under all circumstances the judgment should be reversed.

Dated, San Francisco, California,
September 6, 1950.

Respectfully submitted,

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(Appendix Follows.)

Appendix.

Appendix

Page 18.

Tsuneishi, V-321.

A. (continuing). I wish to state that at that time Japan was suffering a speedy defeat, and so from my viewpoint it was satisfactory that if we could produce any broadcasts that were then appealing or would appeal to the G.I.'s. But I figured that the Japanese troops—excuse me, that we would wait until the Japanese troops put up severe resistance either in the Philippine Islands, in Okinawa, or on the mainland of Japan, and when they were thus separately resisting, then the program would continue. From that time the propaganda would be greatly increased. Until that time I felt that it could be just a general appeal to the troops.

Mr. Collins. Q. Then the Japanese had thereafter no further successes and in consequence you did not try to convert the program into a propaganda program, isn't that a fact?

A. It was unfortunate, but the opportunity did not present itself for me to present the real true propaganda broadcasts that I wished to.

Page 28.

Witnesses who claimed to have heard defendant's broadcasts.

Gilbert Velasquez—XVIII-1867ff.;

XVIII-1877—"rejectees" getting all the girls at home.

Finschhaven, New Guinea. XVIII-1893:2-6-6-7

P.M. = 4-5 *Tokyo time*!; XVIII-1904:7-9 6 P.M.

= 4 P.M. Tokyo time. (Eastern New Guinea was on Australian wartime, *Sherdeman*, XIX-1996:9-14, 1977:6-8, 1984:12-17.)

XVIII-1904:21-23—Japanese spoken on program!

XVIII-1879—"wives and sweethearts driving in park at home, listening to radio".

XVIII-1818—November, December, 1944, Leyte, Philippines.

XVIII - 1907:4; 1914:24 - 1915:3 — "just before Christmas"

XVIII-1910:6-7-7 P.M. = 8 P.M. Tokyo time.

XVIII-1882:16-19; 1926:13-14—Dec. 23 or 24, 1944 (*Dec. 23, 1944, was a Saturday and Dec. 24, 1944, was a Sunday!*)

XVIII-1880-81—Japanese will treat you right if you surrender, no sense in getting killed. Feb., March, 1945, Leyte, Philippines.

XVIII-1920:12-16—6-7 P.M. = 7-8 P.M. Tokyo time.

Sherdeman—XIX-1971ff.

XIX-1977—Jan.-Feb., 1944, Port Moresby, New Guinea—listen to ballad with your best girl.

XIX-1978—June, 1944, Milne Bay (New Guinea) ice cream soda at cool corner drug store.

XIX-1979—June, 1944—Los Negros, Coconut Grove with your best girl, plenty of Coconuts but no best girls.

XIX-1988:9-11—all programs at 5-6:30 P.M. Brisbane time = 3-4:30 Tokyo time.

XIX-1986:22-5—*Tagalog* spoken on program.

Sutter—XX-2022ff.

XX—2026:7—Sept. 4, 1944, Saipan—Saipan was mined; U. S. troops would be given 48 hours to leave the island, otherwise would be blown to bits. XX-2061:6-8—between 4 and 8 P.M. (This was almost *two months after* the Americans had secured Saipan, July 9, 1944—*Sutter*, XX-2103:18-20.)

Hoot—XX-2110ff.

XX-2116—Dec., 1943.

XX-2117—Gilbert Islands—wouldn't you like to be dancing with loved one? Jan., 1944—aren't folks asking you to come home?

XX-2117-18—Feb., 1944—boys at home making big money and can afford to take girls out.

XX-2118—Between Gilbert and Marshall Islands.—Feb., 1944—demand from commanding officer to be sent home—don't stay in stinking jungle while some one else is out with your girl friend.

XX-2118-19—"leave soon if want to go home—your fleet practically sunk".

XXI-2194-6—congratulations to Comdr. Perry on safe landing "but you'll be sorry".

All of these broadcasts were received in the Gilbert and Marshall Islands *while it was still light* between 5:30-6:30, 6-7 or 4-6 P.M. *Hoot*,

XX-2142:1-5, 2151:18-2152:4, XXI-2169:7-10, 2179:13-17, 2194:20—4-6 P.M. in the Gilbert Islands = 1-3 P.M. Tokyo time; 5:30-6:30 = 2:30-3:30 Tokyo time; 6-7 = 3-4 Tokyo time.

Cavanar—XXI-2216ff.

XXI-2217—May, Aug., 1944, en route to Saipan.

XXI-2218—4-8 P.M.

XXI-2226—"boneheads on mosquito infested islands—remind you of dancing with your girl at Coconut Grove in Los Angeles. ("boneheads" was actually an expression which defendant used jocularly on her program—see Exhs. 16-21, 25).

XXI-2231—"Music for you" was theme song. ("Music for you" is a phrase occurring several times in Exhs. 16-21 and 25, which the witness had heard—XXI-2221:15-17, 2224:16-18—but it is *not the theme song*. "Strike up the Band" was the theme song of the Zero Hour—see Exh. 25.)

Thompson—XXI-2242ff.

XXI-2251—Dec. 26, 1943, Cape Gloucester, New Britain.

XXI-2252—report of troop movements.

XXI-2255:2-4—fixes Dec. 26, 1943 because on that date landed at Cape Gloucester. (*December 26, 1943 was a Sunday.*)

XXI-2252—March, 1944.

XXI-2252—imagine yourself with your best girl in Southern California drive-in—give up this fruitless fight.

XXI-2272—between 4 and 8 P.M.

Gilmore—XXIII-2451ff.

XXIII-2549—played "Moon Over Miami" and asked "how's the moon over Tinian, tonight?"

XXIII-2476—during combat on Tinian.

XXIII-2479:15-18—full moon at the time (the assault on Tinian lasted from July 24 to Aug. 1, 1944, L-5584:13-17; there was no full moon during that period—L-5561:25-5562:2).

Cowan—XXVI-2809ff.

XXVI-2818—Sept., 1944, Oct.-Nov., 1944.

XXVI-2820—"early morning, dusk" in Oct.-Nov. —"you have been deserted—your ships have left you—you will be driven into the sea".

XXVI-2844:9-11—no recollection that voice over air was identified.

Hall—XXVI-2885ff.

XXVI-2892-3—"with your favorite girl friend having an ice cream soda", etc.

XXVI-2896-9, prediction of troop movements.

XXVI-2902—Australians fighting in New Guinea while Americans running around with their wives.

XXVI-2904—21 reasons why you couldn't go to sleep with a redhead.

XXVI-2928:7-17—he had reported the alleged predictions of troop movements to his officers but movements were made as scheduled anyway.

XXVI-2936:4-10—movements made exactly as predicted, despite foreknowledge of "Japanese radio".

XXVI-2938:21-2—dark when he heard these broadcasts.

Henschel—XXVI-2948ff.

XXVI-2959-60—prediction of troop movements.

XXVI-2960-63—Oct. 24-5-6, 1944—Leyte, broadcast on Battle of Leyte Gulf.

XXVI-2961:6-16—at night, during air raid black-out.

XXVI-2988:14-16-9, 10 or 11 P.M. Philippine Time
(= 10, 11, 12 P.M. Tokyo Time).

Page 32.

Witnesses testifying to alleged confessions of defendant.

Clark Lee testified—

defendant said that she broadcast about unfaithful wives and sweethearts (VII-486)

On cross-examination he said he got this item from Harry Brundidge's notes. (VIII-650:22-25, 652:20-653:7.)

(Defendant testified she denied such broadcasts XLVI-5157:9-25). Furthermore we claim the whole interview was under duress (see *infra*).

Kramer testified—

defendant said that there was some discussion at home over the possibility of her being charged with treason against the United States. She did not feel she had committed any treasonable act, but the charge might possibly be made (XIII-1363) *that* defendant said she was badgered by the Japanese police to take out Japanese citizenship but she dropped the idea because she was not the head of a family and it was too much trouble (XIII-1364). (Defendant *testified* that she had said *this was the reason she gave the Japanese police* for not taking out Japanese citizenship. (Def. XLVIII-5374:6-23.) She also *testified* that she had told *Clark Lee* she some-

times thought she was doing wrong in not having enough gumption to disobey army orders. (XLIX-5446:21-5447:22)). *That* defendant said that by a process of elimination she inferred that "Tokyo Rose" had been applied to her, since she had the most English on her program. (XIII-1365:20-25.)

(Defendant *testified* that she could not recall having told him this, but that she wasn't sure. (XLVIII-5376:21-5378:20).)

In addition to some innocuous assertions, *Cramer* made the very interesting statement that *defendant told him she took no active steps after her marriage to acquire Portuguese citizenship, because that might look as if she was running away from possible charges in the United States.*

The interview with Dale Cramer, we claim, was also given under duress. We discuss this issue *infra*.

Merritt Gillespie Page testified—

that defendant said that Maj. Cousens had told her she was to be a broadcaster on a propaganda broadcast, that Radio Tokyo wanted to get a woman announcer with a less stereotyped voice in order to get away from the coarser type of propaganda. (XIV-1424.)

(Defendant *testified* that the only thing Cousens (or any one) told her was that the program would be purely entertainment (XLV-4999:3-10); that she so told *Page* (XLIX-5453:21-25) and that Cousens referred to the Japanese propaganda purpose only obliquely when he said they were

fooling the Japanese. (XLVI-5103:1-5105:1; XLIX-5506:18-5508:4, 5456:25-5457:2).)

that she thought the broadcasting would be good experience and she wanted to entertain the troops and it would supplement her income. (XIV-1425:17-19.) (Defendant *denied* she ever said she took the job for experience. (XLIX-5454:1-17).)

that she did not know whether Cousens and Ince broadcast voluntarily or not. (XIV-1426:17-18.)

(Defendant *confirmed* this, saying she did not know where Cousens or Ince were at the time or how to contact them, so did not want to commit herself. (XLIX-5454:18-5455:5).)

James Keeney testified that defendant said—

that broadcasting paid more money and was more interesting than typing, she enjoyed the contacts and surroundings and thought she would find a future in radio. (XIV-1405.)

(Defendant *confirmed* that the broadcasting was more interesting, though she didn't know whether she had said it, *confirmed* that she may have said she enjoyed the contacts at Radio Tokyo, since it was true (elsewhere she *testified* she was glad to have had contact with the prisoners of war, XLVII-5317:14-15), *denied* she said she took the job because it paid more money—it did not pay more: *denied* that she said she thought she'd have a future in broadcasting (XLVIII-5367:25-5369:21), *that* after a radio account of a "Time"

article which had been received, the Zero Hour staff decided by a process of elimination that it must refer to her. (XIV-1406:6-16.)

(Defendant testified on the contrary that the Zero Hour staff concluded that "Tokyo Rose" could *not* refer to her, and *Mitsushio* said it could not refer to any one on Radio Tokyo. (XLV-5053:22-5054A:2.) Ruth Hayakawa *testified* that some of the staff thought "Tokyo Rose" must refer to her (Hayakawa) R. 385-6. Founmy Sai-sho *testified* that *Oki* told her he ought to claim half the royalties for "Tokyo Rose"—(indicating that he considered his wife, Mieko Furuya Oki, to be "Tokyo Rose". (R. 403).)

Wm. E. Fennimore testified—

that he interviewed the defendant with Sgt. Page; he partly follows Page's testimony to the effect that defendant said—

that Maj. Cousens told her they were interested in securing a new voice, not stereotyped, for a new propaganda broadcast; that she wanted the money involved, she thought it would be good experience, that she thought it would be entertaining to the troops.

Fennimore added details of his own in saying she said *that* she referred to dancing with your wife or best girl to the tune of "Stardust"—and asking "I wonder what she is doing now?"

(The defendant repeatedly *denied* having talked to Fennimore about the case at all (XLVIII-5366:

15-19, see generally XLVIII-5364:1-5367:4, also XLVIII-5372:15-5373:9, XLIX-5455:6-5456:9)).

Page 74.

Johnson v. Eisentrager, 94 L. Ed. Adv. Ops. 814, 821.

“American doctrine as to the effect of war upon the status of nationals of belligerents took permanent shape following our first foreign war. Chancellor Kent, after considering the leading authorities of his time, declared the law to be that ‘* * * in war, the subjects of each country were enemies to each other, and bound to regard and treat each other as such’. *Griswold v. Waddington*, 16 Johns (N.Y.) 438, 480. If this was ever something of a fiction, it is one validated by the actualities of modern total warfare. Conscription, compulsory service and measures to mobilize every human being and material resource and to utilize nationals—wherever they may be—in arms, intrigue and sabotage, attest the prophetic realism of what once may have seemed a doctrinaire and artificial principle. With confirmation of our recent history, we may reiterate this Court’s earlier teaching that in war ‘every individual of one nation must acknowledge every individual of another nation as his own enemy—because the enemy of his country’. The *Rapid*, 8 Cranch 155, 161.”

Page 78.

Defendant, XLIX-5505:9-5506:7.

“Q. Did you fear to stop, quit working on the Zero Hour program?

A. Yes. In fact, I asked a couple of times to quit.

Q. Did you fear to quit?

A. Yes. I always got the same answer.

Q. What was the answer?

A. It would be a good idea not to quit. You know the consequences.

Q. Why did you fear to quit?

A. Well, I knew that I was an alien in Japan. They would have—if I did not agree to their orders, I could have been put away for good.

Q. Did you fear that?

A. Yes.

Q. And so because of that fear did you continue on in your employment?

A. That was the only reason I continued.

Q. Did you at that time know the consequences of a refusal to continue to broadcast?

A. Yes.

Q. What were the consequences?

A. If you just refused, they would just take you away, the kempei may question you, and you may never be heard of.

Q. Did you fear for your life?

A. Yes, that is understood."

Page 79.

Defendant, XLV-4994:12-4995-1.

"I asked him why he was at Radio Tokyo, and I asked him why Wallace and Reyes were there. He explained that they had been captured in the south, and they had to fill out, or they were asked to fill out their biography by the Japanese Army, their occupation, and so forth, and, well, they made out a report to the effect that they had been experienced in radio, and they had been selected by the army and ordered to Radio Tokyo to work in the Radio field for the Japanese Army. It was *Major Cousens who told me that they were under threat of being executed if they refused an army order, and therefore*

they were all three of them in that predicament at Radio Tokyo. They were writing script."

Defendant, XLV-4996:9-4996:18; also 4997:2-9.

"Well, with Major Cousens it was specifically his trip from Malaya up to Radio Tokyo and *all of the various prisons and camps and the tortures he went through and the treatment on the ship, on board ship, the sicknesses all the prisoners of war had gotten on board the ship. He had witnessed all these executions in Burma, also in Malaya. And with Major Ince it was the tortures in Corregidor, with Reyes it was the treatment in this jail, in this prison camp in the Philippines.*"

"He said that this Major Tsuneishi had direct and complete control of these prisoners of war, *that he had ordered them to Radio Tokyo under threat of death if they did not obey the army orders; that is why they had no choice.* Major Cousens said they wanted to live out this war, and so they were going to just do as they were told."

Defendant, XLVI-5079:13-22; also 5080:10-15.

"Major Cousens told me that, constantly reminded me that, never to disobey the Japanese army militarists, because they were brutal and sly and cunning and he said to place all my confidence *in him and act as he instructed me*, but never say anything against the Japanese army officers or army orders, as all the boys down at Bunka, and specially one in December, had been taken away from Bunka for refusing to obey army orders. He never heard anything from him. Then later on, about in March, *Captain Kalbfleisch was taken away to be executed.*

Q. Now, did you learn what happened to him [Captain Ince] as a result of that?

A. *He was taken off the Zero Hour, he was going to be taken out of Bunka camp. Major Cousens intervened, saved his life.*

Q. Now, did you fear like treatment if you failed to obey Japanese army orders and continue on the Zero Hour program?

A. *Yes, because it was directly told to me by Mr. Huga."*

Page 91.

Hayakawa, R. 395-6.

"A. I wasn't aware of fear of the Kempeitai until toward the end of 1943 and the rest of the time, and it was a constant dread from the Summer of 1944, in that you didn't dare to talk to anyone, whether they were your friends or not, of personal opinions or viewpoints. I remember one detail; the Prisoners of War asked me once what my pleasures were—what I did for (12) amusement—and I remember saying that flower arrangement was the only source of pleasure and recreation for me. That remark was considered unpatriotic by the Kempeitais and Mrs. Oki (Mieko Furuya), whom I considered one of my closest friends at the time, warned me that the Kempeitai might call me in and reprimand me for telling the Prisoners of War that. And for talking or being seen with the Prisoners of War also. She said that the Kempeitai had told her to tell me. It scared me to the extent where I no longer went down to the studio to listen to their program, except only on the occasions when I was called in to participate in the Prisoners of War program. It was impossible to discuss interviews by the Kempeitai with anyone, because when I was detained by the Kempeitai, before they released me,

I had to sign a statement which they wrote because I could not write Japanese, which they read to me and explained to me, which meant that I was not to tell anyone, not even my mother and father, that I was questioned and detained by the Kempeitai. If I told anyone about my detention, the Kempeitai will not be held responsible for anything that might happen to me. I had to sign that and put my thumb print on it. Of course, they told me to sign the statement, telling me incidents of people being questioned and detained and not coming out of the Kempeitai Headquarters alive.”

Page 97.

Exhibit W for Identification (in part).

“Regulations for Prisoners

1. Prisoners disobeying the following orders will be punished with immediate death.

(a) Those disobeying orders and instructions.

(b) Those showing a motion of antagonism and raising a sign of opposition.

(c) Those disordering the regulations by individualism, egoism, thinking only about yourself, rushing for your own goods.

(d) Those walking without permission.

(e) Those walking and moving without order.

(f) Those carrying unnecessary baggage in embarking.

(g) Those resisting.

(h) Those touching the boat's materials, wires, electric lights, tools, switches, etc.

(i) Those climbing ladder without order.

(j) Those showing action of running away from the room or boat.

(k) Those trying to take more meal than given to them.

(l) Those using more than two blankets.

2. Since the boat is not well equipped (sic) and inside being narrow, food being scarce and poor, you'll feel uncomfortable during the short time on the boat. Those losing patience and disordering the regulations will be heavily punished for the reason of not being able to escort.

4. Meal will be given twice a day . . . Those moving from their places reaching for your plate without order will be heavily punished. Same orders will be applied in handling plates after meal.

6. Navy of the Great Japanese Empire will not try to punish you all with death. Those obeying all the rules and regulations, and believing the action and purpose of the Japanese Navy, cooperating with Japan in constructing the 'New order of the Great Asia' which lead to the world's peace will be well treated.

The End''.

Page 105.

Foster's Crown Cases (1776), pages 216-17.

“Sect. 8. The joining with rebels in an act of rebellion, or with enemies in acts of hostility, will make a man a traitor; in the one case within the clause of levying war, in the other within that of adhering to the King's enemies. But if this be done for fear of death, and while the party is under actual force, and he take the first opportunity that offereth to make

his escape; this fear and compulsion will excuse him. It is however incumbent on the party who maketh fear and compulsion his defence, to shew, to the satisfaction of the court and jury, that the compulsion continued during all the time he staid with the rebels or enemies.

I will not say, that he is obliged to account for every day, week, or month. That perhaps would be impossible. And therefore if an original force be proved, and the prisoner can shew, that he in earnest attempted to escape and was prevented; or that he did get off and was forced back, or that he was narrowly watched, and all passes guarded; or from other circumstances, which it is impossible to state with precision, but which, when proved, ought to weigh with a jury, that an attempt to escape would have been attended with great difficulty and danger; *so that upon the whole he may be presumed to have continued among them against his will, though not constantly under an actual force or fear of immediate death*,—these circumstances and others of the like tendency, proved to the satisfaction of the court and jury, will be sufficient to excuse him.” (Italics in original.)

Page 106.

East's Pleas of the Crown (1806), pages 70-71.

“But if the joining with rebels be from fear of present death, and while the party is under actual force, such fear and compulsion will excuse him. It is incumbent, however, on the party setting up this defence to give satisfactory proof that the compulsion continued during all the time that he staid with the rebels. It may perhaps be impossible to account for every day, week, or month; and therefore *it may*

be sufficient to excuse him if he can prove an original force upon him, that he in earnest attempted to escape and was prevented, or that he was so narrowly watched, or the passes so guarded, that an attempt to escape or to refuse his assistance would have been attended with great difficulty and danger; and, if the circumstance will admit of it, that he quitted the service as soon as he could: so that upon the whole he may fairly be presumed to have continued amongst them against his will, though not constantly under an actual force or fear of immediate death. This is agreeable to the rule in Oldcastle's case: where those who were charged as his accomplices in rebellion were acquitted by the judgment of the court, because the acts were found to be done pro timore mortis, et quod recesserunt quam cito potuerunt." * * *

" * * In all like cases of the Scotch rebels, the matter of fact, whether force or no force, and how long that force continued, with every circumstance tending to show the practicability or impracticability of an escape, was left to the jury on the whole evidence.*

(p. 72) *"* * * Yet paying contribution to rebels to prevent the plunder of the country, or making submission to them when resistance would be dangerous and in all probability unavailing, is excusable; for in times of open hostilities the jus belli is the only practicable law. But if it appear that the party wanted the will rather than the power to deny his assistance, and there appear any marks of consciousness that he might if he pleased have withheld it, he is inexcusable if upon a pretence of fear or doubt of compulsion he gives such assistance."*

Page 108.

U. S. v. Greiner, 26 Fed. Cas. 36, 40.

“His duty of allegiance to the United States continued to be thus paramount *so long at least as their government was able to maintain its peace through its own courts of justice* in Georgia, and thus extend, there, to the citizen that protection which affords him security in his allegiance, and in the foundation of his duty of allegiance. Though *the subsequent occurrences which have closed these courts in Georgia may have rendered the continuance of such protection within her limits impossible at this time*, we know that a different state of things existed at the time of the hostile occupation of the fort. The revolutionary secession of the state, though threatened, had not yet been consummated. This party’s duty of allegiance to the United States therefore, could not *then* be affected by any *conflicting enforced allegiance* to the state.”

Page 127.

Van Beeck v. Sabine Towing Co., 300 U.S. 342, 344.

“The [statute] * * * ushered in a new policy and broke with old traditions. Its meaning is likely to be misread if shreds of the discarded policy are treated as still clinging to it and narrowing its scope.

(pp. 350-51) “[These] statutes have their roots in dissatisfaction with the archaisms of the law which have been traced to their origin in the course of this opinion. It would be a misfortune if a narrow or grudging process of construction were to exemplify and perpetuate the very evils to be remedied. There are times when uncertain words are to be wrought into consistency and unity with a legislative policy which is itself a source of law, a new generative im-

pulse transmitted to the legal system. 'The Legislature has the power to decide what the policy of the law shall be, and if it has intimated its will, however indirectly, that will should be recognized and obeyed'. Its intimation is clear enough in the statutes now before us that their effects shall not be stifled, without the warrant of clear necessity, by the perpetuation of a policy which now has had its day.'

Page 156.

Defendant, XLVIII-5321:24-5322:8.

"Mr. DeWolfe. Q. Did you tell your husband before you left Japan that you were a Portuguese national?

A. I can't remember.

Q. *You heard your husband testify that you told him in Japan and here that you were a Portuguese national, didn't you?*

A. Yes, according to the Portuguese consul, yes.

Q. *You heard your husband testify that you told him in Japan and in the United States here—that you told him in both places that you were a Portuguese national? You heard him so testify?*

A. I do not recall."

Again at XLVIII-5338:2-9:

"Q. Mr. Richard Eisenhart, that young man who was here, did not ask you to autograph it as Tokyo Rose, did he?

A. Oh, he did not get it from me, no.

Q. *You heard him testify that he was present when you signed it?*

A. He was not present when I signed it, no.

Q. *I said you heard him testify that he was, didn't you?*

A. I do not recall his testimony."

Page 158.

Defendant, XLVIII-5368:12-5369:15.

"Q. Didn't you tell him or say in his presence at your home in Tokyo on or about 3 September 1945 that you took the job at Radio Tokyo because it paid more than your typist job?

A. No, because it did not.

Q. *Did you hear him testify that you said that?*

A. I have forgotten. I do not know.

Mr. Collins. Just a minute, Your Honor. It is purely argumentative.

The Court. The question has been asked and answered.

Mr. Collins. And it is improper cross-examination of this witness.

Mr. DeWolfe. Q. You say you have forgotten what he testified to?

A. I can't say for sure——

Mr. Collins. Just a moment, Mrs. D'Aquino. We object to that on the ground it is improper cross-examination.

The Court. The objection may be overruled.

Read the question, Mr. Reporter.

(Question read.)

Mr. DeWolfe. Q. *Do you remember Sgt. Keeney testifying that you told him that you took the job on the radio because it paid more than your typist job?*

Mr. Collins. I object to that on the ground it is improper cross-examination of this witness.

Mr. DeWolfe. Q. *Do you remember him so testifying?*

Mr. Collins. Just a moment, Mrs. D'Aquino. I object to it on the ground it is improper cross-examination.

The Court. The objection may be overruled. You may answer."

Page 158.

Defendant, XLIX-5395:25-5396:9.

“Q. And he didn’t compliment you on your broadcasting work?

A. No.

Q. *But you heard Reyes testify that he did make those statements in your presence?*

Mr. Collins. I object to that, if your Honor please, on the ground that it is argumentative, it is improper cross-examination.

The Court. *The objection will be overruled*, she may state whether or not she heard him say that.

A. I believe he did say something like that.”

Page 158.

Defendant, XLIX-5397:1-5398:2.

“Q. Didn’t you broadcast in the fall of 1944 words in substance and effect as follows, ‘O.K., sarge, leave out the beer. Let’s have some cold water. Cold water sure tastes good.’?”

A. No, I never said anything like that.

Q. *You heard Reyes testify that you did, didn’t you?*

Mr. Collins. I object to that, if your Honor please, on the ground that that is improper cross-examination, and on the further ground that it is an improper attempt to impeach this witness through the testimony of another witness given in this court.

The Court. *The objection will be overruled*, she may answer.

Mr. DeWolfe. Q. *You heard Reyes testify that you did broadcast that, didn’t you, Mrs. D’Aquino?*

A. I don’t know whether I recall Reyes saying that. I remember Mr. Mitsushio saying something like that.

Q. *Don't you recall Reyes testifying that you broadcast those words?*

Mr. Collins. I object to that on the ground, if your Honor please, the question has been asked and answered.

The Court. *The objection will be overruled, the witness may answer.*

A. As I stated, I remember Mr. Mitsushio saying it, but I can't recall——

Q. The question was, can you recall Mr. Reyes saying that, not Mr. Mitsushio?

A. I can't recall Mr. Reyes saying that."

Page 158.

Cross-Examination of defendant on testimony of other witnesses,

XLVIII-5369:22-5370 (all); 5381:1-25; 5371:1-5372:1.

Q. Didn't you tell Sgt. Keeney or say in his presence on 3 September 1945 at your home in Tokyo that you took the broadcasting job because you may find a future in radio work, or words to that effect?

Mr. Collins. I object to that on the ground it is improper cross examination. It is a matter that was not even touched upon on direct examination.

Mr. DeWolfe. Intent—treasonous intent.

The Court. The objection may be overruled. You may answer.

Mr. Collins. I object to that on the further ground it is an improper attempt to impeach the witness.

The Court. The objection may be overruled.

* * * * *

A. What was the question again?

(Question read.)

Mr. Collins. I wish to take exception to counsel for the prosecution's remark as to the so-called treasonous intent and ask that the jury, and I assign it as misconduct on the part of the counsel for the prosecution and ask that the jury be instructed to disregard counsel's statement.

The Court. The objection will be overruled. Let the record stand, and answer the question, please.

A. No, I don't remember saying anything like that to Mr. Keeney.

Mr. DeWolfe. Q. Did you hear Sergeant Keeney testify that you——

Mr. Collins. Object to it on the ground——

Mr. DeWolfe. Wait until I finish my question, Mr. Collins.

Q. Did you hear Sergeant Keeney testify, Mrs. D'Aquino, that you told him that in substance on that occasion?

Mr. Collins. Object to it on the ground that it is improper cross examination and it is improper impeachment of the witness on the stand from another person's testimony.

The Court. A conversation had at a time and place certain, a statement made in the presence of the defendant?

Mr. Collins. This is made in open court, if your Honor please; that it what this statement is.

XLVIII, 5371:1-5372:1.

The Court. Read the question, Mr. Reporter.
(Question read.)

The Court. You may answer; the objection will be overruled.

The Witness. What was the question? Isn't there a question—the original question?

Mr. DeWolfe. Q. The reporter just read it to you, Mrs. D'Aquino. Do you want it read again?

Mr. Collins. We object to that on the ground, if your Honor please—assign that as misconduct on the part of counsel too, to have made such a statement. The witness is entitled to have the question read back.

Mr. DeWolfe. I just asked her if she wanted it read back, your Honor.

The Court. Read the question, Mr. Reporter.

(Question read.)

The Witness. Testify to what?

Mr. DeWolfe. Q. That you told him you took the job because you might find a future in radio?

Mr. Collins. We object to that on the ground, if your Honor please, it is improper cross examination.

The Court. Objection overruled. You may answer.

A. Whether I heard him testify here?

Mr. DeWolfe. Q. Yes, to that point, that you told him that.

A. It may have been I heard it. I don't know the exact words he used, though.

XLIX-5403:20-5404:9.

Q. And you were present when Kenneth Ishii broadcast news about American battle losses?

A. I can't say that, no.

Q. *You heard Ken Ishii testify that you were, didn't you, Mrs. D'Aquino?*

Mr. Collins. I object to that on the ground it assumes something not in evidence, and on the further ground it is

improper cross examination, and on the further ground it is an attempt to impeach this witness with the testimony given by another witness.

The Court. *The objection is overruled.*

Mr. DeWolfe. Q. *You heard Kenneth Ishii testify you were present when he broadcast about American battle losses, isn't that correct?*

A. I think I heard him testify that he broadcast news.

XLIX-5405:8-5406:14.

Mr. DeWolfe. Q. Before deductions you got 180 yen a month after the summer of 1944, didn't you?

A. No, I do not think it was ever that much.

Q. *You heard Mr. Yamazaki testify that that is what you got, didn't you?*

Mr. Collins. I object to that on the ground that Mr. Yamazaki did not so testify and the reporter's transcript is the best evidence of that, and it shows deductions of 20 to 25 per cent were to be made.

The Court. *She may state whether or not she heard him make that statement.* The jury heard the testimony. It is a matter for the jury to determine what the testimony is. Proceed.

Mr. DeWolfe. Q. You heard Mr. Yamazaki testify you got 180 yen a month before deductions after the summer of 1944?

A. I think that is what he testified, yes.

Q. *And you do not know whether that is accurate or not, do you?*

A. You see, Mr. DeWolfe, I was——

Q. *Answer the question.*

Mr. Collins. Just a moment.

Mr. DeWolfe. Q. *Answer the question. You do not know whether that is accurate or not, do you?*

Mr. Collins. Mrs. D'Aquino, just a moment. You are not taking any instructions from Mr. DeWolfe. We ask for a Court ruling on that. The witness had not answered the prior question before counsel interrupted.

The Court. Read the question.

(Question read.)

The Court. You may answer.

The Witness. You mean the testimony?

Mr. DeWolfe. Q. Yes. Mr. Yamazaki's testimony that you got 180 yen a month before deductions.

A. *I do not know whether that is accurate or not, no.*

Here we have a repetition of the misstatement of Yamazaki's testimony, and a demand that the witness say whether the *misstated* testimony is "*accurate*"!

More of the same immediately follows:

XLIX-5406:18-5407:5.

Q. You complained to him that your salary was not sufficient, didn't you?

A. I never complained to Mr. Yamazaki, no.

Q. *You heard him testify that you did, didn't you?*

Mr. Collins. I object to that on the ground that it is improper cross-examination and on the further ground it is an improper attempt to impeach this witness by the testimony given by another witness of this trial.

The Court. The objection will be overruled.

Mr. DeWolfe. Q. *You heard Mr. Yamazaki say you did ask him for more money, didn't you?*

A. I am not positive, but I think he did state something like that.

XLIX-5409:15-5410:3.

Q. You told Mr. Reyes that you were worried about what was going to happen to you in the United States after the war was over, didn't you?

A. I do not remember any such conversations I had with Mr. Reyes.

Q. *Do you recall Reyes testifying that you said that?*

Mr. Collins. I object to that on the ground it is improper cross-examination. Furthermore, it is an improper attempt to impeach the witness on the stand with testimony in this case, if it was given in this court, by another witness.

The Court. *The objection is overruled.*

Mr. DeWolfe. Q. Do you recall hearing Reyes testify to that?

A. I believe he did say something like that.

Page 161.

At XLIX-5447:23-5448:19 we have:

Mr. DeWolfe. Q. Did you broadcast on Armistice Day, November 11th, 1944, from Radio Tokyo, that it was time to forget the war and remember the date? Or words in substance to that effect?

Mr. Collins. Just a moment, please. I object to that as improper cross-examination of the witness on matters not developed on direct examination.

The Court. The objection is overruled. You may answer.

A. I have never said those words.

Mr. DeWolfe. Q. *You heard witness Reyes, your witness, say that you did, didn't you?*

Mr. Collins. Object to that on the ground that it is assuming something that is not in evidence and it is a distortion of the testimony of the witness.

Mr. DeWolfe. *Volume 33, page 3804, he so testified under oath, your witness, Mr. Collins, that you put on the stand, for the truth of whose testimony you vouch for, not the United States.*

The Court. Read the question, Mr. Reporter.

(Question read.)

Mr. Collins. I object to that on the ground that that is improper cross-examination of the witness on a matter not developed upon direct examination, on the further ground that it is an improper attempt to impeach this witness by the testimony of another witness at this trial.

The Court. The objection will be overruled, you may answer the question.

A. Yes, I think he did say something like that.

At XLIX-5450-52 there is more of the same. XLIV-5450:7-5451:9.

Q. Never said anything like that. Did you broadcast on 8 December 1944, three years after Pearl Harbor, in substance as follows: "The war is three years old today and where it stops nobody knows. But why worry, bone-heads, when I am here? So relax and listen to the pretty music, like good boys." Did you broadcast words to that effect, in substance, on or about that day, December 8, 1944?

Mr. Collins. Object to that on the ground—

Mr. DeWolfe Q. (continuing). Or any other date?

Mr. Collins. I object to that on the ground that it is improper cross-examination of the witness upon matters not even dwelt upon on the direct examination.

The Court. The objection will be overruled, you may answer.

A. No, I do not recall ever broadcasting anything of that nature.

Mr. DeWolfe. Q. *You heard your witness, Reyes, testify that you did broadcast that, Mrs. D'Aquino, didn't you?*

Mr. Collins. I object to that, if your Honor please, on the ground that that is argumentative, on the further ground it is improper cross-examination of this witness upon matters not developed upon direct examination, on the further ground that it is an improper attempt to impeach this witness by the testimony of another witness given at this trial.

The Court. Objection overruled, the witness may answer.

Mr. DeWolfe. Q. *You heard Reyes—*

The Court. Just a moment, let the witness answer.

Mr. DeWolfe. All right, excuse me. I thought she wanted it reframed.

A. I believe he said something like that, yes.

XLIX-5451:19-5452:9.

Q. And you told Merritt Page that you took the job of broadcasting because it would be good experience, would entertain the troops and would supplement your income; in substance you told him that, didn't you?

A. I don't recall exactly what I told Mr. Page.

Q. *Did you hear him testify here that you did tell him those words, in substance, exactly like I have repeated them here in court in the last question?*

Mr. Collins. I object to that on the ground that that is an improper attempt to impeach the witness by testimony of another witness given at this trial, and on the further ground it is improper cross-examination.

The Court. The objection will be overruled, the witness may answer.

A. I can't recall what each and every witness has testified to, no, I can't.

And at XLIX-5455:6-9, 19-5456:9.

Q. And you made the statement to Fenimore that you did not know, Mr. William Fenimore, that you did not know whether Ince or Cousens were broadcasting voluntarily or were broadcasting under duress, did you?

* * * * *

Q. *You heard Sergeant Fenimore testify here under oath that you made that statement to him, didn't you?*

Mr. Collins. Object to that on the ground that that is argumentative, on the further ground it is improper cross-examination of the witness upon matters not developed upon her direct examination, on the further ground that it is an improper attempt to impeach this witness on the testimony given by another witness at this trial.

The Court. Objection will be overruled, the witness may answer.

A. What was that question?

(Question read.)

A. I think I did, but I said that I had never had an interview with Sergeant Fenimore. The first time I saw

him was after the interview was over, and he finger-printed me at the C.I.C. headquarters. That was the only time I saw Fenimore.

XLIX-5460:23-5463:9; 5463:18-5464:18; 5465:9-5467:23.

Q. He was a friend, wasn't he?

A. Well, first he wasn't a friend. Later he became a friend.

Q. Did you hear his deposition read when he said that during the war he was a friend of yours and Mr. Philip D'Aquino's?

Mr. Collins. Object to that on the ground, if Your Honor please, that that is improper cross-examination; on the further ground it is an improper attempt to impeach the witness by testimony of another witness given at this trial.

The Court. Read the question.

(Record read.)

Mr. Collins. And I think this is assuming a fact not in evidence. I don't recall any such testimony being given in the deposition of Katsuo Okada to that effect.

The Court. Let the witness answer. Objection overruled.

Q. Did you?

A. I can't remember all the depositions and all the witnesses' statements.

Mr. DeWolfe. Q. Well, do you remember it, or don't you, Mrs. D'Aquino?

Mr. Collins. Object to that on the ground it is improper cross-examination, on the ground, further ground, it is an improper attempt to impeach this witness from

the testimony given in a deposition by another witness at this trial.

The Court. Objection overruled; she may answer.

A. Well, I don't know. He may have said it, yes.

Q. I see.

A. I can't——

The Court. Q. Did you hear him say it?

A. It was a deposition, Your Honor.

Mr. Collins. It was the deposition read into evidence here, Your Honor.

The Witness. I can't remember all the depositions that were present in this——

The Court. Q. He didn't ask you whether you could remember. Do you recall hearing him so testify?

A. There was a deposition, Your Honor.

Q. Yes, did you hear the deposition read?

A. Yes, I read it, but——

Q. Do you recall it?

A. I can't recall it, no, word for word.

The Court. Very well. Proceed. If she can't recall it, she can't recall it.

Mr. DeWolfe. Q. Now, Mrs. D'Aquino, while you were working on the Zero Hour, in the presence of Norman Reyes, your superiors at Radio Tokyo made direct reference to the fact that the purpose of the Zero Hour was to create homesickness in order to have a demoralizing effect on American troops?

A. Never.

Q. Did you hear witness Reyes testify that in your presence many such statements were made?

Mr. Collins. Object to that on the ground it is improper cross-examination of matters not developed with

this witness on direct examination; on the further ground it is an improper attempt to impeach this witness by the testimony of another witness given at this trial.

The Court. Was this witness present?

Mr. DeWolfe. Yes, sir.

The Court. The objection will be overruled. Let the witness answer.

A. There again, I can't remember all of what Norman Reyes testified to. He was on the stand three or four days. I cannot recall it.

* * * * *

XLIX-5463:18-5464:18.

Q. All right. And while you were on the Zero Hour program, Ince did not attempt to insert any hidden meanings or double talk in your scripts, did he?

A. Why, one was read in evidence.

The Court. Q. What was read in evidence?

A. One of the scripts.

Mr. DeWolfe. Q. Well, did Ince on the Zero Hour program attempt to insert any hidden meanings in your scripts?

Mr. Collins. Objected to on the ground it is calling for the opinion and conclusion of the witness; on the further ground it is improper cross-examination.

The Court. If the witness knows, she may answer. The objection will be overruled.

A. I believe it was one of the band music.

Q. I see. Did you hear Ince testify that he did not attempt to insert any double talk or hidden meanings in any of your scripts?

Mr. Collins. Object to that on the ground it is improper cross-examination of this witness on matters not developed on direct examination; and on the further ground that it is an improper attempt to impeach this witness by testimony given by another witness at this trial.

The Court. The objection will be overruled; you may answer.

A. May I have that question again, please?

(Previous question read.)

A. I don't remember specifically that statement, no.

* * * * *

XLIX-5465:9-5467:23.

Q. Did you tell William Fennimore in the Grand Hotel September 1945 that in announcing the various records on the Zero Hour program, pieces like Stardust, you would say to the American troops, "Do you remember when you were home dancing with your wife or with your girl friend to this tune? I wonder what she is doing now."

A. As I stated before, I have never had an interview with Sgt. Fennimore.

Q. Did you hear William Fennimore testify that you told him that, Mrs. D'Aquino?

Mr. Collins. I object to that on the ground it is improper cross-examination of this witness upon matters not developed upon direct examination, and on the further ground that it is an attempt to impeach this witness from the testimony of another witness given at this trial.

The Court. The objection will be overruled. The witness may answer.

A. Yes, I heard him testify in this trial.

Q. Did you hear him testify that you told him those words.

A. I believe I did.

Mr. Collins. Just a moment. I am going to ask that the witness' answer be stricken from the record so that an objection may be interposed.

The Court. It may be stricken.

Mr. Collins. I object to that on the ground that it is improper cross-examination of the witness upon matters not developed upon direct examination, and on the further ground that it is an attempt to impeach the witness by the testimony given by another person who appeared as a witness at this trial.

The Court. The objection will be overruled. Let the question and answer stand.

Mr. DeWolfe. I understand the answer that Your Honor struck now stands?

The Court. You may repeat the question and get an answer if you wish.

Mr. DeWolfe. All right. Well, it is my understanding that it stands.

The Court. What is it?

Mr. DeWolfe. It is my understanding that you struck it first and let it stand, now, and I won't repeat it.

The Court. Well, I did that in the interest of time. If there is any objection to it, or if you are in doubt about it, you might repeat the question and get a record on it.

Mr. DeWolfe. Q. Did you hear Sgt. Fennimore, William Fennimore, testify here that you told him that in announcing various recordings like Stardust, you would

say to the American troops, "Do you remember when you were home dancing with your wives or with your girl friends to this tune? I wonder what she is doing now." Did you hear him so testify?

Mr. Collins. Object to that on the ground it is improper cross-examination.

The Court. Haven't you already objected to that just a moment ago?

Mr. Collins. Yes, I did, but I understand——

The Court. Well, you have got a record on it.

Mr. Collins. It was stricken out.

The Court. The answer was stricken out only; the question wasn't stricken out.

Mr. Collins. All right.

The Court. You may answer the question.

Mr. DeWolfe. Q. Did you hear him so testify, Mrs. D'Aquino?

A. I believe I did.

* * * * *

XLIX-5473:20-5474:12; 5475:1-20.

Q. And they gave you some kind of a bonus or present over there, an extra month's salary every New Year's Day, is that correct?

A. I think it was Christmas.

Q. That is a Japanese custom, isn't it?

A. Oh, no, no. That was the minister's custom, yes.

Q. Didn't you hear the deposition of Mr. Tillitse read when he said he gave you a bonus at New Year's and it was a Japanese custom so to do?

A. I do not know whether it was Christmas or New Year's, but I think it was Christmas.

Q. He said it was a Japanese custom, didn't he?

Mr. Collins. I submit, if Your Honor please, the deposition would be the best evidence, and I recall no such statement being included in that deposition.

Mr. DeWolfe. Page 3 of his deposition, I think.

The Court. If these is any question about it, you might look at the deposition.

* * * * *

Q. Minister Tillitse from Denmark in your deposition, as your witness, said, "The salary was in yen 150 from January 1944 to June 1944, and then yen 160 from July 1944 to May 1945.

"In January she received one month's extra salary at New Year's time, as is the custom in Japan;" That is correct, isn't it?

A. I must have been under a mis—

Mr. Collins. Just a moment. I object to that on the ground it is improper cross-examination of the witness; furthermore, it is an improper attempt to impeach the testimony of the witness by the testimony of another witness.

The Court. The objection is overruled.

Mr. Collins. I direct Your Honor's attention to the fact that it is not specified in the testimony that it was the Japanese custom.

The Court. In any event, the ultimate fact is she got a month's salary. Whether it was at Christmas or New Year's makes no material difference. It is the ultimate fact. Let us proceed.

Mr. DeWolfe. All right, sir.

Page 162.

Cross-Examination of defendant on testimony of other witnesses,
XLIX-5477:1-25.

Q. You told your husband that you liked your work at Radio Tokyo better than you liked your work at Domei, didn't you?

A. I do not know whether I did or I did not.

Q. *You heard your husband that you told him that, didn't you?*

Mr. Collins. I object to it on the ground it is improper cross examination on matters not developed by direct examination; and on the further ground it is an improper attempt to impeach the testimony given by another witness.

The Court. The objection is overruled.

(Question read.)

The Witness. May I have the previous question, please?

(Previous question read.)

A. I did not like Domei. I may have said that.

Mr. DeWolfe. Q. *Did you hear your husband testify that you told him you liked your job broadcasting on the radio better than you did your job at Domei?*

Mr. Collins. I object to that on the ground it is not proper cross examination, concerning matters not developed on the direct examination, and on the further ground it is an attempt to impeach the witness by testimony of another witness, and on the further ground it relates to a matter of privileged communication.

The Court. The objection is overruled. You may answer.

The Witness. I can't say for sure what I heard here, I have heard so much.

Page 163.

Ince, XXXI-3533:2-11.

“Q. After Miss Toguri began participating in the Zero Hour, did you while you were on that program attempt to insert any hidden meanings or double talk in the scripts?

A. I did not, because I did not write the scripts for her.

Q. Well, do you know whether there was any attempt to insert hidden meanings or double talk into the script?

A. I believe that Major Cousens did.

Q. You wrote some script, didn't you?

A. I rehashed some of his on a few occasions when he was not able to.”

Page 164.

Cross-Examination on Overt Act 8, XLIX-5439:17-5446:11.

Q. Did you appear in this hat dialogue that you heard testimony about? Do you know what I am talking about?

Mr. Collins. Just a moment. We object to that, if Your Honor please, upon the ground it is improper cross examination of the witness upon matters that were not touched upon on the direct examination of this witness.

The Court. The objection will be overruled. Read the question.

(Question read.)

Mr. Collins. If Your Honor please, I wish now to assign this as constituting misconduct on the part of

counsel for the prosecution knowingly to cross examine this witness or attempt to cross examine this witness on matters that were not developed on her direct examination.

The Court. The Court is responsible for the rulings here. No one else is. You have a record. Now let us proceed in the usual way. Reframe your question and let us proceed.

Mr. DeWolfe. Q. Did you participate in a dialogue with George Mitsushio about a hat?

Mr. Collins. Since the question has been reframed, I wish now to interpose my objection again, if Your Honor please.

The Court. The objection will be overruled.

Mr. Collins. I object to it on the ground it is improper cross examination of the witness on matters not developed upon her direct examination.

The Court. The objection is overruled.

Mr. DeWolfe. Overt Act 8, sir.

The Witness. I can't recall that dialogue.

Mr. DeWolfe. Q. You can't. Didn't you broadcast in the latter part of 1945 with George Mitsushio in an entertainment dialogue?

Mr. Collins. I object to that on the ground it is improper cross examination of the witness upon a matter that was not even touched upon on the direct examination of this witness.

The Court. The objection will be overruled.

A. I can't recall any dialogue.

Mr. DeWolfe. Q. Didn't you appear in a broadcast with Mr. Mitsushio in the spring of 1945?

Mr. Collins. I object to that on the ground it is improper cross examination of the witness on matters not even developed upon the direct examination of this witness.

The Court. The objection is overruled. What was that again?

(Question read.)

A. I can't recall, no.

Mr. DeWolfe. Q. Would you say that you did not?

Mr. Collins. I object to that on the ground it is argumentative, and on the further ground it is improper cross examination of the witness on a matter not developed upon direct examination.

The Court. The objection is overruled.

Mr. DeWolfe. Q. Would you say you did not, Mrs. D'Aquino?

A. In the spring of 1945?

Q. Or any time, Mrs. D'Aquino.

A. I can't recall of any dialogue.

Q. Did you make any statement in any of your broadcasts about a hat that you can recall, around 20 June 1945?

Mr. Collins. I object to that on the ground it is improper cross examination of the witness upon a matter that was not even touched upon on direct examination.

The Court. The objection is overruled. You may answer.

A. I am afraid I can't recall anything about a hat.

Mr. DeWolfe. Q. Is this your broadcast on 20 June 1945, Mrs. D'Aquino, or a part of your words:

"Thank you, Ann. Will be expecting you tomorrow night. Why, what is the hurry?"

"Sorry, boss. I am in a hurry. I have got a heavy date waiting for me outside of the studio.

"Stepping out, are you? I should think you would wear a hat, at least, when you go out.

"I do have. It is on this side, see?"

"Good-night, fellows."

I will ask you to look at those words in Government's Exhibit 63 for identification and see if that is not partially at least your language.

Mr. Collins. I object to that on the ground it is improper cross examination of the witness on a matter not even touched upon or developed in the direct examination.

The Court. The objection is overruled.

A. I can't recall this.

Mr. DeWolfe. Q. Will you say that you did not make those statements, Mrs. D'Aquino?

Mr. Collins. I object to that on the ground it is argumentative, and on the further ground it is improper cross examination of the witness on a matter not even developed on her direct examination.

The Court. The objection is overruled. You may answer.

A. I am sorry. I can't recognize.

Mr. DeWolfe. Q. Will you say you did not make that statement over the air?

Mr. Collins. I object to that on the ground it is improper cross examination of the witness on a matter not touched upon on her direct examination.

The Court. The objection is overruled. You may answer.

A. I can't say positively because I can't recognize it.

Mr. DeWolfe. Q. Will you say you did not make that statement over the air?

Mr. Collins. I object to that, if Your Honor please, on the ground it is improper cross examination on matters not developed in the direct examination.

The Court. The objection is overruled. You may answer.

A. I am afraid I can't say I did, because I don't recognize it.

Mr. DeWolfe. Q. Can you say that you did not?

Mr. Collins. I object to that upon the ground it is improper cross examination of the witness on matters not developed on the direct examination, and furthermore, it is purely argumentative.

The Court. The objection is overruled. She may answer.

A. Since I can't recognize it, I can't say anything about it.

Mr. DeWolfe. Q. Can you say that you did not voice these words:

"Sorry, boys, I am in a hurry. I've got a heavy date waiting for me outside the studio."

And another voice on the radio:

"Stepping out, are you? I should think you would wear a hat, at least when you go out."

And you said, "I do have. It is on this side, see? Good-night, fellows."

And just preceding that quotation somebody said:

"Thank you, Ann. We'll be expecting you tomorrow night. Why, what is the hurry?"

Those words were all spoken in your presence, weren't they?

Mr. Collins. I object to that on the ground it is argumentative; on the further ground it is improper cross examination of the witness on matters not developed on the direct examination; and on the further ground, it has been asked and answered; and I further assign it as misconduct on the part of counsel for the prosecution to have read such a statement or propounded it in the form of a question to this witness.

The Court. The objection is overruled. She may answer.

The Witness. What was the question?

The Court. Q. Do you recall making those statements?

A. No, I do not.

The Court. Let us conclude.

Mr. DeWolfe. Q. On or about 20 June 1945 over Radio Tokyo?

Mr. Collins. I object to that, if Your Honor please, on the further ground it is improper cross examination of a witness on a matter not developed on direct examination.

The Court. Overruled.

Mr. DeWolfe. Q. Would you say you did not make those statements, Mrs. D'Aquino?

Mr. Collins. I object to it on the ground it is not proper cross examination of the witness, but on a matter not developed on direct examination; furthermore, it is purely argumentative.

The Court. The objection is overruled. You may answer.

A. I can't recall, no.

Mr. DeWolfe. Q. Will you say that you did not make the statements that I have just read in Government's Exhibit 63 for identification?

Mr. Collins. I object to that on the ground the question is purely argumentative and improper cross examination on a matter not developed on the direct examination.

The Court. The objection is overruled.

The Witness. I can't recall any of that.

Mr. DeWolfe. Q. Would you say that you did not make this statement that I just read?

Mr. Collins. I object to that on the ground it is purely argumentative and on the further ground the question has been asked and answered; and on the final ground that it is improper cross examination on a matter not developed on the direct examination.

The Court. The Court has indicated he is entitled to an answer under the law to that question. The objection is overruled. She may answer.

The Witness. Will you give it to me again?

The Court. Read it.

(Question read.)

Mr. DeWolfe. Q. Or any part thereof.

A. I will say I did not make it because I do not recall anything like it."

Page 165.

II Arg. 337:23-339:8.

"Now the defendant says that she never broadcast this eighth overt act. *Unhesitatingly that she has anything to do with that incident.* They don't know

that we have a script concerning that. We don't know it either, that we have a script as such, which is properly identifiable in evidence, until Frances Roth, a very nice young lady, is sent here by the Federal Communications Commission. She arrived here recently, she was put on by the government in rebuttal. You remember that blonde young lady. And exhibit 63, which you now have in your power to consider, the defendant denies. Now you know, as reasonable men and women, that she decided not to admit anything. She is not admitting a thing. She knows what overt acts are. *She has talked to her lawyer. She figures if the United States can't prove one overt act against her, she is free. And she is not going to get up in that witness stand and admit the commission of any overt act, even though she committed it. She is not going to tell you the truth about it.*

Now we have the script. The girl comes here and testifies, and she is telling the truth. The defendant won't admit it. *She unequivocally denies it.* And the script is Exhibit 63, which reads as follows:

'And that was your languid music for tonight. It was my pleasure to deliver, and here's hoping the taking wasn't too painful. May we invite you fighting G.I.s tomorrow night along about the same time? O.K., see you then. This is Orphan Ann, reminding you G.I.s always to be good, and, goodbye now.'

And then they play the record you heard, 'Goodbye now.' And then,

'Thank you. And we will be expecting you tomorrow night.'

'Why, what's the hurry?'

She denies this, it is on print here.

'Sorry, boss, I am in a hurry. I have got a heavy date waiting for me outside the studio.'

‘Stepping out, are you? I should think you would wear a hat, at least, when you go out.’

‘I do have, it is on this side. See? Goodnight fellows.’ ”

Page 167.

State v. Crowder, 119 Wash. 450, 205 Pac. 850, 852.

“If the facts testified to in chief had directly or by inference tended to dispute or deny the charge, there might be force in this position; but, as we view it, the testimony referred to had no such possible effect.

** * * The purpose of cross-examination is to break or weaken the force of the testimony given in chief, it should be used as a shield and not as a sword, and as the state had already, as a part of its own case, offered evidence to prove the identical facts testified to on direct examination by appellant, it could hardly have desired, by its cross-examination, to accomplish the legitimate result of breaking or weakening appellant’s testimony in that respect. Moreover, the testimony elicited on cross-examination had no such purpose or effect, but its evident purpose, * * * was to cause the appellant to incriminate himself.”*

Page 169.

XLVII-5245:13-25.

“Q. Well, does your sworn statement under oath now refresh your recollection as to your Japanese nationality and when you renounced it?

Mr. Collins. I object to that, if Your Honor please, on the ground that is calling for the opinion and conclusion of the witness, that this is on a form utilized by the—it is on a standard form used by the American Consular Service; and furthermore, it calls for an absolute impossibility. No United States national can

be given by any act of any foreign country or by any other person save and except the person himself, any foreign nationality.

The Court. The objection will be overruled; she may answer. Read the question. (Question read.)''

Page 170.

Defendant, XLVII-5310:10-5311:10.

Q. You did not think the Japanese, Mrs. D'Aquino, were paying you to get up and entertain American troops, did you?

A. That is what they were doing.

Q. That's what they were doing. You honestly, Mrs. D'Aquino, and sincerely thought the Japanese were paying you money to entertain American troops, is that right?

A. No, that is not right.

Q. You didn't think that the Japanese militarists were so gracious that they wanted you to make the American soldiers have a happy half hour or so, did you?

A. I was working at the Radio Tokyo as a typist —

Q. Did you think that?

Mr. Collins. Just a moment, Mr. DeWolfe. Let the witness answer the question you propounded. We ask for a court ruling on that, instead of having her interrupted by counsel.

Mr. DeWolfe. I asked her what she thought about broadcasts. Now she is going off on another point and talking about typing at Radio Tokyo.

Mr. Collins. We assign that as misconduct on the part of counsel for the government to make such charges.

Mr. DeWolfe. It is true. It is no charge at all.

The Court. Read the question.

(Question read.)

The Court. You may answer the question.

A. I do not know what the militarists—I do not know what you mean by that statement.

Mr. Collins. I submit, if Your Honor please, that is calling for the opinion and conclusion of the witness and not material to the issues in this case.

The Court. The objection is overruled. The witness may answer.

The Witness. I can't say all the programs, no.

Mr. DeWolfe. Q. You can't say that, Mrs. D'Aquino?

A. No, because I do not think I have heard hardly any of the programs over Radio Tokyo.

Q. You told Agent Tillman when he interviewed you in 1946 that all the Japanese radio programs were propagandistic?

A. I do not recall.

Q. If you did tell him that, the statement was true, wasn't it?

A. If it is in the statement, yes.

Q. Are you able to say now whether it was in the statement or not?

A. I remember having argued with Mr. Tillman about that one phase for about three minutes.

Q. Are you able to say whether or not it is in the statement?

A. I can't say for sure.

Mr. Collins. The statement, Mr. DeWolfe, is the best evidence of its own contents.

Mr. DeWolfe. Q. Do you say you do not know whether or not all Japanese programs were propagandistic?

Mr. Collins. I submit it is improper impeachment of the witness, Your Honor.

Mr. DeWolfe. Q. Do you say that?

Mr. Collins. Just a moment. I ask for a ruling on the objection.

The Court. Read the question.

(Question read.)

The Court. The objection is overruled. You may answer.

A. I guess they were.

Page 170.

XLVIII-5320:15-5321:11.

“Q. You told your husband after he came over here in June that you were a Portuguese national, didn’t you?

A. I don’t know whether I told him, discussed with him the citizenship problem or not.

Q. Well, you won’t say that you did not tell him after he came over here in June of this year that you were a Portuguese national, would you?

A. I do not think the subject has ever been discussed.

Q. Would you say you did not tell him that?

Mr. Collins. I submit, if Your Honor please, that is argumentative. The witness has answered the question.

Mr. DeWolfe. She has not answered it.

Mr. Collins. I further object to it on the ground that it is a privileged communication between husband and wife.

Mr. DeWolfe. The husband has waived it. He got on the stand and testified to the conversation. He testified about this matter on direct and cross-ex-

amination the other day when counsel put him on the stand.

The Court. The objection is overruled. You may answer. Read the question, Mr. Reporter.

(Question read.)

A. I can't distinctly recall."

Page 172.

Defendant, XLVIII-5323:15-5324:23.

"Mr. Collins. I submit, if Your Honor please, that is calling for the opinion and conclusion of the witness and not material to the issues in this case.

The Court. The objection is overruled. The witness may answer.

The Witness. I can't say all the programs, no.

Mr. DeWolfe. Q. You can't say that, Mrs. D'Aquino?

A. No, because I do not think I have heard hardly any of the programs over Radio Tokyo.

Q. You told Agent Tillman when he interviewed you in 1946 that all the Japanese radio programs were propagandistic?

A. I do not recall.

Q. If you did tell him that, the statement was true, wasn't it?

A. If it is in the statement, yes.

Q. Are you able to say now whether it was in the statement or not?

A. I remember having argued with Mr. Tillman about that one phase for about three minutes.

Q. Are you able to say whether or not it is in the statement?

A. I can't say for sure.

Mr. Collins. The statement, Mr. DeWolfe, is the best evidence of its own contents.

Mr. Dewolfe. Q. Do you say you do not know whether or no all Japanese programs were propagandistic?

Mr. Collins. I submit it is improper impeachment of the witness, Your Honor.

Mr. DeWolfe. Q. Do you say that?

Mr. Collins. Just a moment. I ask for a ruling on the objection.

The Court. Read the question.

(Question read.)

The Court. The objection is overruled. You may answer.

A. I guess they were."

Page 172.

XLIX-5392:5-21.

"Q. No, I didn't ask you that, Mrs. D'Aquino. I asked you if your best judgment was that the wordage on Exhibit 25 attributed to 'Ann' was voiced by you, in your best judgment? Answer that yes or no.

A. According to the record, yes.

Q. *According to Exhibit 25, Mrs. D'Aquino? Yes or no.*

A. According to the Exhibit 25?

Q. Yes.

Mr. Collins. I object to that on the ground that is purely argumentative.

The Court. She may answer, objection overruled.

A. You mean 25 used with the records?

Q. Yes.

A. Yes.

Q. Those are, to your best judgment, your words, the words in 25 attributed to 'Ann', they were voiced by you? Yes or no.

A. Yes, those voiced on the record, yes."

Page 172.

XLIX-5476:13-22.

"Mr. DeWolfe. Q. Sgt. Okata knew you were buying food on the black market, didn't he?

A. Yes.

Mr. Collins. I object to that on the ground that it calls for the opinion and conclusion of the witness.

The Court. Just a moment.

Mr. DeWolfe. 'Sgt. Okata knew you were buying food on the black market?'

The Court. You may answer.

The Witness. I think he did, yes."

Page 173.

XLIX-5488:5-20.

"Q. Now did you have a disaffection for Japan, the land of your ancestors, when you went to Japan in July 1941?

Mr. Collins. I submit, if your Honor please, the question is purely argumentative.

The Court. Objection overruled, the witness may answer.

A. Could you explain that to me, please?

Mr. DeWolfe. Q. Don't you understand the question, Mrs. D'Aquino?

A. No, I don't.

Q. You don't. Did you have an affection for Japan, the land of your ancestors, when you went over there, July 4, 1941, July 5, 1941?

Mr. Collins. I object to that on the ground the question is argumentative.

The Court. Objection overruled, the witness may answer.

A. Well, I had no affection for the country, no."

Page 173.

XLIX-5494:7-13.

Mr. DeWolfe. Q. You are an American citizen, aren't you, Mrs. D'Aquino?

Mr. Collins. I object to that on the ground it is calling for the opinion and conclusion of the witness.

The Court. The witness may answer, objection overruled.

Mr. DeWolfe. Q. You are an American citizen, aren't you?

A. I don't know what I am."

Page 173.

Defendant, XLVII-5251:10-5253:11.

Mr. DeWolfe. Q. You did not state in 1947 that you were not Portuguese, did you?

A. May I have that question over again?

Q. Yes. Is it hard for you to understand?

A. You had a double negative there.

Q. Did you state in 1947 that you were not a Portuguese, Mrs. D'Aquino? Can you understand that?

A. Did I not say?

Q. Did you state in 1947 that you were not a Portuguese citizen? Do you understand that question? Is that question difficult for you?

A. I was not——

Q. Is the question difficult, Mrs. D'Aquino?

Mr. Collins. Just a moment. Let the witness finish her answer to the question, Mr. DeWolfe. You have propounded two or three questions.

The Court. Read the question.

(Question read.)

Mr. DeWolfe. Q. Do you understand that question?

A. Does that mean stated orally or in a statement?

Q. Orally or in a statement, either way. Do you understand the question, Mrs. D'Aquino, or do you want me to rephrase it?

A. Let's see. I don't quite get it.

The Court. Read the question.

(Question reread.)

A. No.

Mr. DeWolfe. Q. Is the question hard for you to understand?

A. I believe my answer is "no."

Q. Was that question hard for you to understand?

Mr. Collins. I submit that is argumentative anyway. You did not lay the foundation, Mr. DeWolfe.

The Court. The question has been asked and answered. Let us proceed.

Mr. DeWolfe. Q. Was that question hard for you to understand?

Mr. Collins. I object to that as argumentative.

The Court. She may answer.

Mr. DeWolfe. Q. Was that hard for you to understand?

A. Yes, because I did not know when in 1947.

Q. You are supposed to be the one who knows, Mrs. D'Aquino.

Mr. Collins. Just a moment. I submit, if Your Honor please, that is argumentative.

Mr. DeWolfe. Q. Was the question hard for you to understand?

Mr. Collins. I submit, if Your Honor please, that is argumentative.

The Court. She may answer.

Mr. DeWolfe. Q. Was it difficult for you to understand? Answer my question, please.

A. Yes, because I didn't know whether I had made the statement orally or in a statement.

Page 174.

Defendant, XLVII-5296:8-5297:3.

Q. I see. Well, you are sure or almost sure that he didn't tell you that any statement you made could be used against you? Mr. Hogan?

A. That's correct.

Q. Are you sure or almost sure or positive, which?

A. I don't remember talking to Mr. Hogan.

Q. At all?

A. I could not—I can not recall him saying that to me, Mr. DeWolfe.

Q. Well, will you say that he didn't say it? Are you positive he didn't say it?

Mr. Collins. That is argumentative, if Your Honor please.

The Court. Objection overruled. Let the witness answer.

Mr. DeWolfe. Q. Are you positive Mr. Hogan didn't tell you that any statement you made might be used against you?

A. He did not say that to me.

Q. You are positive?

A. Yes, I am almost positive.

Q. Almost positive. Didn't you ask Mr. Hogan whether or not you were going to be tried for treason?

A. I don't recall talking to Mr. Hogan about that.

Page 174.

Defendant, XLVIII-5320:15-5321:11.

Q. You told your husband after he came over here in June that you were a Portuguese national, didn't you?

A. I don't know whether I told him, discussed with him the citizenship problem or not.

Q. Well, you won't say that you did not tell him after he came over here in June of this year that you were a Portuguese national, would you?

A. I do not think the subject has ever been discussed.

Q. Would you say you did not tell him that?

Mr. Collins. I submit, if Your Honor please, that is argumentative. The witness has answered the question.

Mr. DeWolfe. She has not answered it.

Mr. Collins. I further object to it on the ground that it is a privileged communication between husband and wife.

Mr. DeWolfe. The husband has waived it. He got on the stand and testified to the conversation. He testified about this matter on direct and cross examination the other day when counsel put him on the stand.

The Court. The objection is overruled. You may answer. Read the question, Mr. Reporter.

(Question read.)

A. I can't distinctly recall.

Page 174.

Defendant, XLVIII-5374:6-23.

Q. And you told him at that time in substance that you had considered the idea of becoming a Japanese citizen, but you dropped the matter because you were not the head of the house and the whole thing seemed too much trouble. You told him that, didn't you?

Mr. Collins. Just a moment, Mrs. D'Aquino. I object to that on the ground that it is highly improper cross examination of this witness, upon matters that are not even touched upon in the direct examination of this witness.

The Court. The objection will be overruled. You may answer.

Mr. DeWolfe. Q. You told him that, didn't you, Mrs. D'Aquino?

A. No, I told him that that was what I told the police, to keep me from taking out Japanese citizenship.

Q. You didn't tell Sergeant Cramer that, did you?

A. I told him that was the way I kept from taking Japanese citizenship, was to give that reason to the Japanese police.

Page 174.

Defendant, XLVIII-5376:21-5378:12.

Q. All right. At about the same time you told Sergeant Cramer at your home in Tokyo that by a process of elimination, since you were speaking in the English language more than anyone else over Radio Tokyo, or over the Zero Hour, that is, you must be the one the troops called Tokyo Rose. You told him that, didn't you. Now answer that yes or no.

Mr. Collins. Just a moment, Mrs. D'Aquino. We object to that on the ground it is highly improper cross examination of this witness on matters that were not even touched upon on the direct examination of the witness and furthermore, it is an improper attempt to impeach this witness from the testimony of another witness given at this trial.

The Court. The court has ruled repeatedly on the same objections, and you have a record here. The objection will be overruled; the witness may answer.

The Witness. May I have the question again?

(Previous question read.)

A. I don't recall ever telling him that.

Mr. DeWolfe. Q. Will you say you didn't tell Sergeant Cramer, that, Mrs. D'Aquino?

Mr. Collins. I object to that on the ground it is purely argumentative.

The Court. The witness answered she does not recall. Let the question and answer stand. Proceed with your examination.

Mr. DeWolfe. Q. Will you say you didn't tell him that?

Mr. Collins. Object to that on the ground it is argumentative, repetitious.

The Court. The objection will be overruled; you may answer.

Mr. DeWolfe. Q. Will you say you didn't tell him that?

A. I don't recall.

(Page 174.

Defendant, XLVIII-5382:14-23.

Q. Did you tell him on either one of those occasions at your home that as between typing and broadcasting you would much rather broadcast?

Mr. Collins. I object to that on the ground it is improper cross examination upon matters that are not touched upon on the direct examination.

The Court. Objection overruled.

The Witness. What was the question?

(Previous question read.)

A. I may have told him that, yes.

(Page 174.

XLVIII-5383:2-10.

Q. Yes. And you also told him that you thought that broadcasting might come in handy at some future time?

Mr. Collins. Object to that on the ground it is improper cross examination upon matters not touched upon in the direct examination of this witness.

The Court. Objection overruled; the witness may answer.

The Witness. What was the question again, please?

(Previous question read.)

A. No, I don't remember anything like that.

Page 175.

Defendant, XLIX-5447:23-5447A:6.

Mr. DeWolfe. Q. Did you broadcast on Armistice Day, November 11th, 1944, from Radio Tokyo, that it was time to forget the war and remember the date? Or words in substance to that effect?

Mr. Collins. Just a moment, please. I object to that as improper cross examination of the witness on matters not developed on direct examination.

The Court. The objection is overruled. You may answer.

A. I have never said those words.

Page 175.

Defendant, XLIX-5450:7-20.

Q. Never said anything like that. Did you broadcast on 8 December 1944, three years after Pearl Harbor in substance as follows, "The war is three years old today and where it stops nobody knows. But why worry, bone-heads, when I am here? So relax and listen to the pretty music, like good boys." Did you broadcast words to that effect, in substance, on or about that day, December 8, 1944?

Mr. Collins. Object to that on the ground—

Mr. DeWolfe (continuing). Or any other date?

Mr. Collins. I object to that on the ground that it is improper cross examination of the witness upon matters not even dwelt upon on the direct examination.

The Court. The objection will be overruled, you may answer.

A. No, I do not recall ever broadcasting anything of that nature.

Page 177.

XLIX-5398:6-5399:5.

"Q. How many scripts did you have in your possession?

A. Oh, let's see; oh, I may have had about, oh, anywhere from 15 to 20, perhaps.

Q. Well, how many scripts would that be?

A. Well, I mean, 15 or 20 complete scripts.

Q. *Well, you testified yesterday that you gave 40 away?*

A. No, you asked me——

Q. *40 or 50 away with autographs as 'Tokyo Rose' on them?*

Mr. Collins. No such statement was made in this court, Mr. DeWolfe.

A. No.

Mr. DeWolfe. You make your objection to the court, don't speak to me.

Mr. Collins. Well, I object to it on the ground the question was absolutely misleading, no testimony was given, and it is an absolute misstatement of the evidence.

The Court. Read the question, Mr. Reporter.

(Question read.)

The Court. Did you so testify yesterday, if you recall?

The Witness. My recollection is, when Mr. DeWolfe showed me the Japanese money that was signed, he asked me how many objects I had signed with the appellation 'Tokio Rose', and I said somewhere around 30 or 40, all told, including the scripts and the other things. That is the best of my recollection."

Page 178.

XXX-3432:17-3433:2.

"A. First, yes, sir; latterly, no, because latterly, when I came into possession of the facts by virtue of an organized attempt to get all the information we could from every Japanese source, I came into possession of facts that led me to believe that the war

could have been brought to a very swift conclusion if unconditional surrender had been explained, and in pursuit of that, I made it my business to get as close as possible to any Japanese likely to have information. I instructed the prisoners at Bunka to do the same thing, and when Suzuki government was formed in Japan, I was told that that was the surrender government.

Q. Did you ever write any broadcasts or any scripts, the substance of which had to do with unconditional surrender?

A. Yes, sir."

Page 178.

Defendant, L-5540:14-5546:1.

Q. You talk, Mrs. D'Aquino, about filing applications for re-establishment of your American citizenship in 1947, is that right?

A. Yes, that is correct.

Q. What you filed, Mrs. D'Aquino, if you will look at government's exhibit 5—and I think it is the same as your exhibit, this paper; if not, I will let you look at your own exhibit—but actually what you filed is entitled "Application for passport, form for native citizen", isn't it?

A. I applied for a passport at the same time I applied for the re-establishing of my United States citizenship, that is correct.

Q. There is no document that you filed entitled "Application for re-establishment of American citizenship", Mrs. D'Aquino, is there?

A. I[t] was not included in this other—

Q. I will show you your exhibit BP. It says, "Application for passport, form for native citizen". That is just a copy, isn't it, that I have shown you?

A. Yes. Isn't there something else in here?

Q. We will see. "Affidavit by native American to explain protracted foreign residence."

A. Yes.

Q. You filed an application for passport in 1947, didn't you?

A. That is right.

Q. And together with the application for passport you filed State Department form of affidavit by a native American to explain your foreign resident, isn't that correct?

A. That is correct.

Q. And another affidavit that has no heading, all of which are part of the government exhibit.

A. I think this is the one that said something about re-establishing United States citizenship.

Q. No, Mrs. D'Aquino, I will show you both exhibits.

Mr. Collins. Let me put the application for the passport together with the documents.

Mr. DeWolfe. You are not testifying now. Mrs. D'Aquino is testifying. Here is the same thing in the government's exhibit under seal purporting to be complete and correct. You find no statement anywhere that you filed under this title, 'Application for reestablishment of American citizenship', do you, Mrs. D'Aquino?

A. I am pretty sure that is the title up here.

Q. Do you think somebody has taken a title off of some of those exhibits?

A. No, but I distinctly remember because that was the whole thing from the very beginning, the reestablishing.

Q. Isn't it a fact, Mrs. D'Aquino, all you filed for was an application for passport accompanied by a State Department form 2 and 3 to explain your residence abroad and that is all?

A. That is not what vice-consul Pfeiffer told me.

Q. Well, you haven't got any application for reestablishing your citizenship in evidence here in any event, have you?

A. All those affidavits, those statements and everything—that was what was listed in this memorandum to file for reestablishment. That is why all these things were sent in.

Q. None of these applications are for reestablishment of American citizenship, are they, Mrs. D'Aquino?

Mr. Collins. Just a moment, Mr. DeWolfe. The documents speak for themselves, and that is the whole purpose of such an application, whether it is entitled that or not.

The Court. The objection will be overruled. Let the witness answer.

A. What was that question?

(Question read.)

A. That was the understanding, yes.

Mr. DeWolfe. Q. The application of 26 May 1947 was sworn under oath by you, wasn't it?

A. That is correct.

Q. With your picture on it?

A. That is right.

Q. And that is entitled "Application for passport", isn't it?

A. Yes, I made the application for passport at the same time.

Q. And you signed that under oath on 26 May 1947?

A. That is correct.

Q. And you stated then that you were a native citizen of the United States, didn't you?

A. That is right.

Q. And swore to that under oath?

A. That is right.

Q. That is your application for passport, isn't it?

A. That is right.

Q. You accompanied that with some other documents, didn't you?

A. Yes, that was asked by the consulate.

Q. The next document we find pertaining to your situation is an affidavit by a native American to explain protracted foreign residence, isn't it?

A. That is right.

Q. You do not see anything in there about establishing or reestablishing American citizenship, do you?

A. Not in that one, no.

Q. The next one says, "This form must be filled out", and so forth. It does not say anything about establishment of American citizenship, does it?

Mr. Collins. The document speaks for itself.

A. This is a letter I wrote to the consul just prior to my application on which I said I would like to make an inquiry regarding the memorandum, the registration requirements of persons of Japanese ancestry resident in Japan. I should like to trouble you for a clarification of items No. 4 and No. 8 of your memorandum.

Q. And you are not able to find in exhibit 5 for the United States, if you want to look at it, and your own exhibit BP for the defendant, any State Department forms that you signed entitled "Application for reestablishment

of American citizenship'' or any title in any government application with words to that effect, do you?

A. This is the same.

Q. I think they are the same. So what you filed was an application for passport, Mrs. D'Aquino, accompanied by affidavits to explain your residence abroad, isn't that correct?

A. That was not my understanding, no.

Q. Well, that is what the exhibits, government's 5 and defendant's BP, disclose, isn't it?

A. Discloses, yes, that I applied for a passport, yes.

Q. And discloses that you filed affidavits at the request of the State Department to explain your residence abroad, correct?

A. That part is correct also.

Q. In your application for passport I think you swore that you were a native citizen of the United States in 1947, is that correct?

A. Yes, I recall.

Q. In your application for passport, defendant's exhibit BP, and in defendant's exhibit BP your affidavit was signed by you?

A. That is correct.

Q. And this is entitled "Form 2 and 3, affidavit by native American to explain protracted foreign residence"?

A. Yes.

Q. The second part does not apply to you, does it, because it is an affidavit by naturalized native American?

A. That is correct.

Q. In this affidavit that you state you signed, you signed it on 26 May 1947, defendant's exhibit BP—

A. That is right.

Q. You signed it under oath?

A. That is right.

Q. You stated again that you were a native American citizen?

A. Yes.

Page 179.

Beck v. U. S., 33 F. (2d) 107, 114.

"The same attitude of counsel is exhibited in the manner of examining witnesses. For example, a witness on direct examination would testify that Mr. Barrett, or some one else, made a certain statement. Counsel would then ask, 'was Mr. Beck in the room? The witness answered, 'He was there sometimes'. Counsel would then ask 'Did *they* tell you?' so and so leaving a direct impression that Mr. Beck made the representations, *an impression not intended by the witness*". ("they" italicized in original).

Page 182.

Hadgedorn, XXXIX-4327:19-4328:2; 4329:2-4331:13.

Q. Did you make reference in your log at any time to Tokyo Rose?

A. Yes.

Q. On what day?

A. On July 25, 1943.

Q. What was the reference that you made in your log?

Mr. DeWolfe. I object to it as immaterial, Your Honor, irrelevant and incompetent. She never heard the Zero Hour program, never heard a woman announce the name Tokyo Rose over the air, and the question is irrelevant and immaterial.

* * * * *

Q. Does your log show the name of any person who made that announcement?

Mr. DeWolfe. I object to that as immaterial, Your Honor.

The Court. Q. Was this on the Zero Hour?

A. No.

Q. From Tokyo?

A. From Tokyo, but not on the Zero Hour.

Q. Time?

A. I haven't entered the time, but I am sure it was on the broadcast beginning at 11:00 o'clock in the morning.

The Court. The objection is sustained.

Mr. Collins. Q. Did you make a note in your log at the time you received that broadcast on July 25th—

A. On July 25th, 1943.

Q. Did you make reference in your log to the person who had broadcast that announcement?

A. Yes.

Q. What name did you enter in your log as having made that announcement?

Mr. DeWolfe. Objected to as incompetent, irrelevant and immaterial, months before the defendant went on the Zero Hour. Mrs. Hagedorn stated yesterday on voir dire she did not listen to the Zero Hour or Orphan Ann.

Mr. Collins. It is a question of identification of Tokyo Rose, if Your Honor please.

Mr. DeWolfe. What entry she made of the name of the person would be immaterial.

The Court. Objection sustained.

Mr. Collins. I would like to make an offer of proof on that particular point.

Mr. DeWolfe. I do not think that is necessary. He has a record.

Mr. Collins. Q. On July 25th, 1943, upon receiving by shortwave radio, Radio Tokyo, about 8:00 o'clock in the morning a broadcast of a woman's voice, did you enter in your log the name of Tokyo Rose as having made that specific broadcast?

Mr. DeWolfe. Objected to as incompetent, irrelevant and immaterial, hearsay, and not the best evidence.

The Court. Objection sustained.

Mr. Collins. I make an offer of proof now that if the witness were permitted to answer the questions propounded to her in connection with this offer of proof, that her answer would be, "Yes".

The Court. I do not follow you.

Mr. Collins. Well, I will withdraw it. I would like to make an offer of proof that if the same question be presented to the witness who is now on the witness stand that her answer and response to that question would be that she entered in her log at July 25, 1943 that the broadcast made by a woman's voice at 8:00 a.m., making the announcement that Radio Tokyo would soon have a new program to the East Coast, was entered in that log under the name of Tokyo Rose.

Page 183.

Stanley.

First he places himself at Dutch Harbor from August, 1942, to October, 1943. (Stanley, XXXIX-4339:20-23):

"Q. When did you go to Dutch Harbor?

A. It must have been about August 1942.

Q. How long did you remain at Dutch Harbor, approximately?

A. 14 months."

He is not allowed to give testimony that a radio broadcast was identified as "Tokyo Rose" *during this period* (Stanley, XXXIX- 4340:14-4342:4):

"Q. While you were at Dutch Harbor, was any person identified to you as being Tokyo Rose?

Mr. DeWolfe. I object to that as hearsay.

The Witness. I heard her mentioned.

The Court. Just a moment. The objection will be sustained.

Mr. Collins. Q. While you were at Dutch Harbor, did you hear any discussion among our troops concerning any lady known by the name of Tokyo Rose?

Mr. DeWolfe. Objected to as incompetent, irrelevant and immaterial, and hearsay. He was up there in August, 1942——

Mr. Collins. Then I will just make an offer of proof on this.

The Court. The objection will be sustained. You have a record on it.

Mr. Collins. I would like to offer to prove——

The Court. Proceed in the usual way. *I am not entertaining an offer of proof.* Proceed.

Mr. Collins. Your Honor is going to bar me from making an offer of proof on that point?

The Court. Proceed by question and answer and you will have a record.

Mr. Collins. I wish to make an offer of proof by this witness at this time that while he was at Dutch Harbor——

Mr. DeWolfe. I object to this form of procedure, Your Honor.

The Court. Objection sustained.

Mr. Collins. Q. Did you, while at Dutch Harbor in August of 1942, hear any discussion from our troops there stationed with you concerning a person designated as Tokyo Rose?

Mr. DeWolfe. Objected to as calling for hearsay.

The Court. Objection sustained.

Mr. Collins. I make an offer of proof that if the witness——

The Court. It is clearly hearsay.

Mr. Collins. I understand that, Your Honor, but I wish to make an offer of proof because I think this goes to the gossip source of stories——

The Court. You may have your own thought on this, but this Court has ruled. Proceed in the usual way.

Mr. Collins. Am I denied making an offer of proof on that point?

The Court. Proceed.”

Page 183.

Cox, XXXVII-4243:15-4244:25.

Q. Yes. Now prior to the time you were shot down, Mr. Cox, had you ever heard of the name “Tokyo Rose”?

A. I had heard of her.

Mr. Knapp. Objected to, your Honor, on the ground of hearsay.

The Court. Clearly hearsay; objection sustained.

Mr. Collins. It is a question, if your Honor please, as to whether or not there was generally known at that time any person known as Tokyo Rose, whether it was by virtue of mere gossip or rumor.

The Court. Well, this is mere conversation between someone. What he heard.

Mr. Collins. Yes.

Q. Well now, prior to the time you were shot down, did you have any discussion or enter into a discussion with any persons concerning the name "Tokyo Rose"?

Mr. Knapp. Objected to, your Honor, on the ground it is hearsay.

The Court. Objection sustained.

Mr. Collins. Q. Well, while you were at Port Moresby in New Guinea, did you have any conversation with soldiers or officers who listened to foreign radio broadcasts?

Mr. Knapp. Objected to, your Honor, on the ground it is hearsay.

The Court. Fix the time.

Mr. Collins. Q. January or February of 1943?

A. Yes, sir.

Q. Now were the conversations concerning the appellation "Tokyo Rose"?

Mr. Knapp. Objected to, your Honor, on the ground it is hearsay.

The Court. Objection sustained, clearly hearsay.

Mr. Collins. It is a question of fixing just an identity. We are not attempting to establish whether it was the defendant or who it was.

The Court. The court has ruled.

Page 183.

N. Gupta, XXXIX-4413:21-4414:13.

"Q. While you were in Honolulu in 1942, that is, after August of 1942, did you listen to any foreign shortwave radio broadcasts?

A. In Honolulu, no.

Q. You did not?

A. I only heard rumors.

Mr. Collins. Q. Of what?

Mr. DeWolfe. I object to that.

The Court. This is no place for rumors. The objection is sustained.

Mr. Collins. Q. While you were on Honolulu, did you hear the name Tokyo Rose?

Mr. DeWolfe. Objected to as hearsay.

The Court. Sustained.

Mr. Collins. Q. During the year 1942, Mr. Gupta, did you ever hear the name Tokyo Rose?

Mr. DeWolfe. I object to that as hearsay.

The Court. Sustained."

Page 196.

II Arg. 328:1-21.

"Here is what he says about Cousens, who was a proponent of what the Japanese fondly called the 'Greater East Asia co-prosperity sphere'. Exhibit 52. Now this is her own witness. You will have this exhibit in the jury room. Here is what he says about his fellow witness, his fellow worker at Radio Tokyo: 'I recall that Major Charles Cousens, Australian Imperial Forces, who had been taken a prisoner of war by the Japanese army, was also engaged in work at Radio Tokyo. During the time I was associated with him, I became convinced (this is Reyes) that he (that is, Cousens) believed that the political problems of Asia and the Pacific Islands could only be solved through the domination of this territory by a strong power, namely, a beneficent Japan. This coincided with the Japanese propaganda idea of the greater East Asia co-prosperity sphere. It is my belief (that is the defendant's witness) that Major Cousens was induced to take part in the broadcasting of propaganda from Radio Tokyo because he thought that he

would have a voice in explaining this idea to the listeners of Radio Tokyo.”

“The defendant’s own witness says that Cousens was pro-Japanese.”

Page 199.

Igarashi, XXIV-2621:23-2624:10.

“Q. What did the defendant say in substance on that occasion, according to the best of your recollection?

A. ‘Back in the United States you listened to this music. Now listen.’

Q. Will you repeat that again?

Mr. Collins. Just a minute. I ask that the Reporter read it.

The Court. The Reporter may read the answer.

(Last answer read.)

Mr. DeWolfe. Q. *Is that all that was said or were there some other words in connection with that statement?*

A. Well, to the best of my recollection on that occasion, that is all I can recollect.

Q. *Did she say anything about sweethearts?*

Mr. Collins. Just a moment, if Your Honor please. I suggest that is leading and suggestive and deliberately coaching the witness and prompting the witness, too, and I assign that as misconduct on the part of the prosecution and ask that the jury be instructed to disregard the statement in its entirety.

The Court. Submitted?

Mr. DeWolfe. Yes, sir.

The Court. It is clearly leading and suggestive. Let the jury disregard it for any purpose in this case.

Mr. Collins. The defense assigns that as misconduct on the part of the prosecution, deliberately so.

Mr. DeWolfe. Don't get excited.

The Court. The Court will take a recess. I will ask the jurors to retire.

(Recess.)

Mr. DeWolfe. *Mr. Reporter, do you have the last question?*

(The reporter read the last question.)

Mr. Collins. I assign that again, if your Honor please, as prejudicial misconduct on the part of the prosecution in this case. He is deliberately prompting and coaching the witness again.

Mr. DeWolfe. I asked the reporter to read the question, your Honor.

Mr. Collins. You certainly knew what the last question was, Mr. DeWolfe.

Mr. DeWolfe. You are stating a falsehood. I did not know it.

Mr. Collins. I ask that the jury be instructed to disregard the remark. I still assign it as misconduct on the part of the prosecution, and highly prejudicial misconduct.

The Court. The objection will be sustained. Proceed. Reframe the question.

Mr. DeWolfe. I asked the reporter to read the last question. I did not reframe the question. I asked the reporter to read the question.

The Court. I asked you to proceed.

Mr. DeWolfe. Q. What was the last statement in substance according to your best recollection that you heard the defendant make?

A. She said in substance, 'Back in the United States you listened to this music. Now listen.'

Q. Do you remember anything else she said on that subject?

Mr. Collins. I submit the question has been asked and answered twice already.

The Court. It may be answered again. The objection is overruled.

Mr. DeWolfe. Q. Any other words in that statement?

A. 'Back in the United States with sweethearts you listened to this music. Now listen.'

Mr. DeWolfe. That is all the direct examination."

Page 199.

Ito, XL-4529:7-4530:5.

"Q. And substantially was the subject matter of those conversations concerning radio work the same in your conversations with her?

A. We didn't talk much about radio work.

Q. But you talked about the radio work, didn't you?

A. Occasionally, yes.

Q. And her conversation with you during those years from 1942 to 1945 on her radio work was substantially the same, about the same matters?

A. I don't understand what you mean.

Q. She talked to you about the same things concerning her work on the radio; didn't she talk to you about her work at the radio?

Mr. Collins. Objected to as incompetent, irrelevant and immaterial.

Mr. DeWolfe. *She answered on direct examination from 1942 to 1945 she talked about her announcing.*

Mr. Collins. There were no conversations developed with reference to work. The questions related specifically to citizenship and the documents.

The Court. Read the question.

(Question read.)

The Court. The objection is overruled. You may answer.

A. Yes, I guess she did."

Page 200.

Defendant, XLVII-5286:10-11.

Q. You tell me; I wasn't there. Were you ever naturalized a Portuguese citizen? Answer that yes or no and then explain if necessary.

XLVII-5287:24-5288:13.

Q. It is a correct statement?

A. *Yes. May I explain it?*

Q. *No.*

Mr. Collins. Just a moment. We ask for the court's ruling. Mr. DeWolfe substituted himself for the court.

Mr. DeWolfe. I am always subject to the court's instruction. The court knows that.

The Court. You will make me nervous if you are not careful. Read the question.

(Question read.)

The Court. Q. Did you answer that question yes or no?

A. Yes, and I asked if I might explain.

Q. What did you answer?

A. Yes.

Q. Now you may explain.

Reyes, XXXIII-3788:7-23.

Q. And that testimony that you gave was false, wasn't it?

A. *Yes, it was. May I explain?*

Q. *No.*

Mr. Collins. Just a moment. We ask for a Court's ruling on that. The witness desires to explain his answer.

Mr. DeWolfe. Q. I think he can be allowed to explain on redirect.

Mr. Collins. The witness is asked to explain. His answer is not complete. You got a yes or no answer; it should be qualified.

The Court. Read the question.

(Question read.)

The Court. Q. What is it that you want to explain? The falsity of the testimony?

A. I wanted to explain these statements given to the FBI, sir. There is a difference between everything I told them and what finally appeared on the statements.

Reyes, XXXV-3966:5-6, 13-23.

Q. Was everything that you told agents Tillman and Dunn in October true, yes or no?

* * * * *

A. May I answer and explain that?

Mr. DeWolfe. Q. No, you answer the question yes or no, Reyes. It calls for a yes or no answer. We don't need explanations from you.

Mr. Collins. Just a moment, please, we object to counsel's statement made to the witness and we ask the court for the ruling.

The Court. Read the question.

(Question read.)

The Court. He may answer that question.

A. No.

Page 205.

2 Wigmore on Evidence (3d ed.), Sec. 278, p. 120.

“It has always been understood—the inference, indeed, is one of the simplest in human experience—that a party’s *falsehood* or *other fraud* in the preparation and presentation of his cause, his fabrication or suppression of evidence by bribery or spoliation, and all similar conduct, is receivable against him as an indication of his consciousness that his case is a weak or unfounded one; and from that consciousness may be inferred the fact itself of the cause’s lack of truth and merit. The inference thus does not apply itself necessarily to any specific fact in the cause, but operates, indefinitely though strongly, against the whole mass of alleged facts constituting his cause.” (Italics in original.)

2 Wigmore on Evidence (3d ed.), Sec. 278, p. 120.

Page 206.

II Arg. 260:2-5; 260:12-21; 292:22-293:9.

* * * We are supposed to be fair. * * * We are trained to be fair. I know that Mr. Hennessy is fair, and it is our duty to be fair; and we are enjoined to follow the lines of fairness.

* * * * *

We are not supposed to, and do not, seek the conviction of any innocent person. We are required to, and do, protect the rights of the innocent. This defendant, Iva Toguri D’Aquino, is entitled to, under the laws of our land, a fair trial. She is getting it. She has had it, or will have had it shortly after his Honor instructs you ladies and gentlemen and after you retire to your jury room to deliberate upon the facts. She is entitled to the

rights that each and every defendant is entitled to in every federal criminal proceeding. His Honor has scrupulously protected her rights. * * *

* * * * *

Well, the government is unjust, Mr. Olshausen says. The prosecution is unjust, unfair, downright crooked. His remark hardly merits the dignity of a reply. Mr. Hennesy has been United States Attorney here for your Federal Judicial District for 13 years, a man of renown and learning at the federal and state bars, a gentleman of good and kindly character, of impeccable probity and unimpeachable integrity. As for myself, I need no defense. I have been with the government well over two decades, and the kind of attack that you hear from Mr. Olshausen is the same slurring, scurrilous attack that you can expect, and we have all experienced in the past from the average criminal lawyer. That is their stock in trade. When the house falls, try the United States. Call it crooked.

Page 214.

K. Murayama re Myrtle Liston, R. 847-8.

“Q. Do you recall any script being prepared by you which referred to a short story of a girl at home and a boy friend who was ineligible for the Army?

Mr. DeWolfe. Objected to as incompetent, not the best evidence.

The Court. Submitted?

Mr. Collins. Yes.

The Court. The objection will have to be sustained.

(A. There were several scripts. I can't recall the exact contents, but the general tenor was such as you

have mentioned. We had stories, short scripts shall we say, of girls having dates with men at home, while possibly their sweethearts or husbands might be fighting in the Southwest Pacific area.)

Q. Do you recall anything about malaria, jungle rot, and high cost of living, or scripts of that tenor?

Mr. DeWolfe. Object to that as immaterial and incompetent; hearsay; not the best evidence; irrelevant.

The Court. Objection sustained.

(A. I can't give you any exact quotation regarding malaria or jungle rot, but I am sure some of the scripts must have included diseases which were prevalent in the tropical areas.)"

Page 218.

People v. Stevenson, 103 Cal. App. 82, 93, 284 P. 487.

"The only way in which prejudicial error could possibly be shown is by an inspection of said transcript, and this right has been denied him. It was not intended that said constitutional provisions [requiring the appellant to show prejudice] should be applied in such a case. To so apply them it would require a showing on the part of the defendant which is rendered impossible by the act of his adversary. The constitutional provisions impose the burden of showing prejudice or injury by a ruling which is within the power of the complaining party to present. It does not contemplate a situation where such party without fault has been denied an opportunity to determine whether or not he has been prejudicially injured * * * We * * * hold * * * that a complaining party should have an opportunity to show injury".

Page 224.

Moriyama, XXIV-2550:13-2551:10; 2551:21-2552a:15.

Mr. DeWolfe. Q. Are you able to recall in substance any particular statement that Miss Toguri made over the air during the period of time that you were there? You can answer that 'Yes' or 'No'.

Mr. Collins. I object to that on the ground it is too vague, indefinite, and uncertain, and no foundation has been laid.

Mr. DeWolfe. I am trying to lay the foundation.

The Court. Read the question.

(Question read.)

The Court. You may answer the question. Overruled.

A. Yes, sir.

Mr. DeWolfe. Q. During what period of time was that statement made, according to your best recollection, approximately?

A. *It was between May, 1944 and September, 1945.*

Q. Where were you when you heard that statement made?

A. I was in the broadcast studio of Radio Tokyo.

Q. In Tokyo?

A. Yes, sir.

Q. Who was in the studio with you?

A. Norman Reyes, Ken Oki, Mrs. D'Aquino and myself.

Q. *Are you able to fix the date any more specifically than between May, 1944 and September, 1945?*

A. *No, sir.*

* * * * *

Q. What did she say in substance, according to your best recollection on that occasion, Mr. Moriyama?

Mr. Collins. I object to that on the ground it calls for the opinion and conclusion of the witness, on the further ground it is based upon hearsay, and the further ground it is not the best evidence, and the further ground no foundation has been laid, and on the final ground that it is incompetent, irrelevant, and immaterial.

The Court. The objection is overruled. Read the question.

(Question read.)

A. This was between records when she made comments. She said, 'Wasn't that wonderful music? How would you like to be at the Cocoanut Grove dancing with your girl to this music?'

Q. What else?

A. This was on another occasion——

Mr. Collins. I would like to interpose the objection again to this additional testimony on this other occasion on the ground it calls for the opinion and conclusion of the witness, and on the further ground it is a voluntary statement on the part of this witness at the present time, and the further ground it is based upon hearsay, and the further ground it is not the best evidence, and the further ground that no foundation has been laid, and on the final ground it is incompetent, irrelevant and immaterial.

The Court. Read the question.

(Question read.)

The Court. Overruled.

Mr. DeWolfe. Q. And the other occasion was between what dates, Mr. Moriyama?

A. *That was also between May, 1944 and September, 1945.*

Q. And you were where when you heard her make the statement?

A. I was in the broadcasting studio.

Q. With her?

A. Yes, sir.

Q. Who else was present, if you recall?

A. The Zero Hour staff, the usual staff, consisting of Norman Reyes, Ken Oki, myself, Mr. Oshidari, and Mrs. D'Aquino.

Q. *Are you able to fix the date any more accurately than being between May, 1944 and September, 1945?*

A. *No, sir.*

Q. What time of day was it?

A. This was about 6:15 in the evening.

Q. What did Mrs. D'Aquino say in substance, according to your best recollection, on this other occasion, as you put it?

A. This was also between records. "My, but it is hot."

Page 224.

Mitsushio, XIII-1325:19-1326:21.

Mr. DeWolfe. Q. When did Ince cease broadcasting on the Zero Hour at Radio Tokyo?

Mr. Collins. I submit that is improper and I object to it on that ground.

The Court. Objection overruled.

The Witness. On or about April 1944.

Q. *Is that when he ceased broadcasting or ceased working on the Zero Hour?*

Mr. Collins. I submit it constitutes cross examination of the prosecution's own witness, and further, it is improper.

The Court. Objection overruled. He may answer.

A. He ceased to come to Radio Tokyo.

Mr. DeWolfe. Q. When did he cease broadcasting on the Zero Hour, if you know?

Mr. Collins. I submit the question has been asked and answered.

The Court. Objection overruled.

Mr. Collins. And constitutes the cross examination of the prosecution's own witness.

The Court. Objection overruled. You may answer.

A. On or about April 1944.

Mr. DeWolfe. Q. Did he work on the Zero Hour in any capacity after April 1944?

A. No, he did not.

Q. Is that when he stopped broadcasting?

A. He stopped broadcasting.

Q. What time?

A. About April 1944.

Page 224.

Ishii, XVII-1829:10-14.

Mr. Hogan. Q. Mr. Ishii, state what you said in substance, to the best of your recollection, in your news broadcast when Mrs. D'Aquino was present in the studio.

Mr. Collins. Objected to as calling for hearsay, calling for the opinion and conclusion of the witness.

1831:8-19.

Q. What did you say, to the best of your recollection, in the news broadcasts on those days in the presence of Mrs. D'Aquino?

Mr. Collins. I object on the ground it is calling for the opinion and conclusion of the witness and entirely too general a question and utterly incompetent, irrelevant and immaterial, and further, no foundation has been laid.

The Court. He may state what he said in the presence of the defendant during that period.

Mr. Collins. I submit no foundation has been laid.

A. As to my news broadcasts, I can only say that they dealt with war news from Japanese military sources and emphasized allied war losses."

Page 225.

Lee, VIII-601:1-10.

"Mr. DeWolfe. Q. Did you hold Mrs. D'Aquino in detention, Mr. Lee?

A. Beg your pardon?

Q. Did you hold Mrs. D'Aquino in detention?

A. No, I did not.

Mr. Collins. I object to the question on the ground it is improper redirect examination. He can not impeach his own witness. He has already testified she was behind locked doors.

The Court. The objection is overruled."

Page 225.

Nii, XXV-2733:11-2735:6; XXV-2736:21-2739:19.

Q. And you and Mr. Tamba were in the room alone?

A. Yes, sir.

Q. And how much whisky?

A. A quart of Four Roses and maybe a bottle of Sunnysbrook Whisky.

Q. Was Mr. Tamba intoxicated?

A. When I went there, he was already red in the face. He was probably drinking with Mr. D'Aquino and his friend.

Q. How much did he have to drink?

A. I don't know. I was drinking fast.

Q. Did you bring your liquor up to Mr. Tamba's room or did he furnish the liquor?

A. He furnished the liquor.

The Court. Do you expect to get through with this witness?

Mr. DeWolfe. I could in about three minutes, Your Honor.

The Court. The jurors may be excused until 2:00 o'clock.

(Thereupon at 12:03 p.m. an adjournment was taken to 2:00 o'clock p.m.)

Afternoon Session, Thursday, August 11, 1949,
2:00 o'clock.

The Court. Proceed.

Motomu Nii

resumed the stand.

Redirect Examination (continued).

Mr. DeWolfe. Q. How much liquor was there in Mr. Tamba's room, in view on the table?

A. A quart of Four Roses.

Q. Was there any more liquor there?

A. I don't remember, but after we finished the quart, there was another quart.

Q. Who produced the other quart?

A. That I have a faint idea—I don't remember very well, but must be either Mr. Tamba or Mr. Nakamuro.

Mr. Collins. I ask that that be stricken out as constituting the opinion and conclusion of the witness.

The Court. The question and answer will stand.

Mr. DeWolfe. Q. Did you bring any liquor up to Mr. Tamba's room?

A. No, sir.

Q. Who poured your drinks when you first went up?

A. Mr. Tamba offered me a drink.

Q. Who poured them?

A. Mr. Tamba.

Q. Had Mr. Tamba been drinking?

A. I thought he had some drinks when I went, because it already showed in his face.

Mr. Collins. I ask that that be stricken out as constituting the opinion and conclusion of the witness, and no foundation has been laid.

The Court. The objection is overruled. Let it stand.

* * * * *

Q. Now, can you tell me approximately how much, what quantity of intoxicants you were used to consuming from January to the present time per day?

Mr. DeWolfe. I don't think that is proper cross-examination, Your Honor.

The Court. The objection will be sustained.

Mr. Collins. Q. Well, as a matter of fact, you were in Tokyo, and at the time you saw Mr. Tamba, Mr. Nakamuro and Mr. Philip D'Aquino, you were used to consuming more than a pint of intoxicating liquor per day, isn't that true?

Mr. DeWolfe. Same objection.

The Court. The objection will be sustained.

Mr. Collins. Q. Well, it was customary for you as a matter of fact to consume more than a pint of hard liquor per day at the time that you saw Mr. Tamba in Japan, isn't that true?

Mr. DeWolfe. Object to that as not proper cross examination.

The Court. Objection sustained.

Mr. Collins. Q. Well, the amount of intoxicating liquor that you consumed in the presence of Mr. Tamba in Japan in April or May of 1949 was the usual quantity of liquor that you had been accustomed to consuming, isn't that true?

Mr. DeWolfe. Object to that as not proper cross examination.

The Court. Objection sustained.

Page 226.

Hall, XXVI-2942:4-2944:11.

Q. Do you recall when Raboul was reduced or secured to our troops?

Mr. Knapp. I object, Your Honor. Counsel is going far afield into another collateral matter.

The Court. The objection will be sustained.

Mr. Collins. Q. You knew, as a matter of fact, that there was a radio station controlled by the Japanese that was broadcasting from Raboul in New Britain at all times when you were at Port Moresby, Dobodura, Nadzab and Biak, isn't that true?

A. No, never having been there either, I did not know.

Q. Weren't our troops bombing Raboul when you were at Port Moresby?

A. They were.

Q. Weren't they also bombing it when you were at Dobodura?

Mr. Knapp. I object to this line of examination.

The Court. The objection will be sustained.

Mr. Collins. Q. Do you recall whether or not you heard any broadcast via radio from a Japanese-controlled radio station at Raboul?

Mr. Knapp. Your Honor, I object to that question. This witness testified on cross examination he heard only one other related broadcast and that was at Java. It has been gone into at great length. Now, he is going to do the same thing for Raboul and I do not know how many others.

The Court. Submitted?

Mr. Collins. Yes.

The Court. Objection sustained.

Mr. Collins. I would like to point out to Your Honor this, that we are concerned now with the witness testifying from the stand that he hears over the radio a program that is coming from a foreign country thousands of miles away, and we are concerned now with the question of identification of that radio station. It is obvious that the witness was not at Radio Tokyo, that he was not at Java, and other sources, but he is permitted to testify in this proceeding as to a radio program that he identifies as coming over Radio Tokyo. We are now trying to test his memory and to test the facts to ascertain whether in truth and in fact he heard such a program emanating from some other station and we submit to Your Honor we are entitled in all justification to endeavor to prove from this witness that matter. The witness' testimony relates to

matters heard over the air five years ago. I say it is impossible for any human being to identify without looking at a radio dial from whence any radio could have emanated five years ago.

The Court. His testimony was the speaker announced the radio.

Mr. Collins. Yes, I admit that, Your Honor. That is what his testimony may be. But for all I know, there may have been ten, fifty or one hundred stations announcing that the programs were emanating from Radio Tokyo or from other sources. That is one of the issues we have been endeavoring to ascertain in this case.

The Court. And I have permitted you the widest latitude. You have gone over the testimony in every detail and the Court has ruled. Now we will proceed with this trial.

Mr. Collins. Did Your Honor rule against me, that I can not ask such a question?

The Court. Yes, I sustained the objection.

Page 226.

Baptist, XVII-1818:8-1819:25.

The Court. Now, is this document complete? Before we adjourned there was a question about it.

Mr. DeWolfe. Oh, sir, there was a page that was taken out before it was identified. I wouldn't take anything out after it was marked by the clerk, of course.

The Court. Is that page available now?

Mr. DeWolfe. Yes, sir, it has been given to counsel for the defendant, and the reason that it was taken out of this document—

The Court. I am not concerned now with the reason, but if this document goes in it will go in in its entirety.

Mr. DeWolfe. Yes, and this document now is offered, with the exception of the last three pages, in evidence, the last four pages, as being exactly, according to the record testimony, the same as Exhibits 16 to 21, sir. It is offered for the purpose of illustrating the contents of those documents.

The Court. Where is that page you were talking about? Is that in this document now?

Mr. DeWolfe. No, sir, it is not.

The Court. Where is it?

Mr. DeWolfe. I have handed a copy to counsel for the defendant, and we will be glad to include it in here, sir.

The Court. If that is included, I will allow it in evidence next in order.

(U.S. Exhibit 25 for Identification was thereupon received in evidence.)

Mr. DeWolfe. We will go ahead with another witness while my colleague inserts that in that exhibit, sir.

Mr. Collins. Since some additional material is to be inserted——

The Court. Not additional. That is the complete document, as I understand it, now.

Mr. Collins. As I understand it, the broadcast of August 11, on inserting the four additional pages——

Mr. DeWolfe. I don't know the date. My colleague is gone. That is the date of the matter that was torn out, prior to the time it was marked, to conform to the exhibits that are in evidence, 16 to 21.

Mr. Collins. It is only that one-half page that was torn, is that correct?

Mr. DeWolfe. I think it is more than that.

We will go ahead with another witness, sir, while he does that.

XVIII-1847:4-20.

Mr. DeWolfe. I may have misunderstood Your Honor yesterday, but I was following Your Honor's instructions as I thought.

Now, there is a matter I want to make clear to the Court if I haven't done it. In Government Exhibit 25 when it was identified there were several pages out of it and we did not change it from the time it was identified. Then Your Honor instructed me to add some pages to make it complete, which he did; but those pages that were added are not in Exhibits 16 to 21. For that reason we didn't think that ought to be in this Exhibit 25, but we added them to 25.

The Court. I understood that fully, my thought being we were not going to separate any of this material, but that it should be offered as a whole so there was no question about it.

Mr. DeWolfe. Very well. But I wanted to make clear that it does not exactly conform now to Exhibits 16 and 21 because of the additional pages.

The Court. Very well.

Page 231.

Saisho, R. 407-8.

“Q. Did you ever know Mr. Ken Oki?

A. Yes.

Q. Do you know his reputation for truth, honesty and integrity in this community?

Mr. DeWolfe. I object to that as incompetent, irrelevant and immaterial, no proper foundation being laid and not a proper impeachment question.

The Court. Objection sustained.

(A. Not good at all.)

Q. Do you know Ken Ishii?

A. Yes.

Q. Do you know his reputation for truth, honesty and integrity?

Mr. DeWolfe. I object to that as being incompetent, irrelevant and immaterial, not proper impeachment, no foundation laid.

The Court. Objection sustained.

(A. Not good at all.)

Q. Do you know George Nakamoto?

A. Yes.

Q. What is his reputation for truth, honesty and integrity?

Mr. DeWolfe. Objected to as being incompetent, irrelevant and immaterial, not proper impeachment, no proper foundation laid.

The Court. Objection sustained.

(A. It wasn't particularly too good.)

Q. I think that is all."

Page 232.

Reyes, XXXII-3705:20-3707:5.

"Q. Was Ince married there about the same time?

Mr. Collins. I submit, if your Honor please, that is absolutely incompetent, irrelevant and immaterial and is improper cross-examination and is assuming a fact not in evidence.

The Court. You may indicate for the purpose of the record the purpose of this testimony.

Mr. DeWolfe. I want to find out if Ince was married on or about that time and to whom, if this witness knows.

The Court. What relation would that have to any issues in this case?

Mr. DeWolfe. Well, it would have some bearing on the witnesses and their relation, and so on.

The Court. For that limited purpose, I will allow it. Read the question, Mr. Reporter.

(Question read.)

A. No.

Mr. DeWolfe. Q. *Did he marry a Filipino woman?*

Mr. Collins. I submit, if your Honor please, this is highly incompetent, irrelevant and immaterial. It is a deliberate attempt to prejudice this jury against witnesses.

The Court. Read the question, Mr. Reporter.

(Question read.)

Mr. Collins. I assign that as misconduct on the part of counsel for the prosecution, if your Honor please.

The Court. If he knows, he may answer. The objection will be overruled.

A. I don't know.

Mr. DeWolfe. Q. You do know, don't you, Norman?

Mr. Collins. That has been asked and answered.

A. I know the name of the woman.

Mr. DeWolfe. Q. You know he married a Filipino woman?

A. No, I do not.

Mr. Collins. I submit, if your Honor please, that has been asked and answered, and is argumentative.

The Court. He says, 'No, he does not'."

Page 232.

Defendant, XLVI-5160:7-17, 5161:5-18.

“Q. Were you asked to read anything there for the correspondents?

A. Just one correspondent—I understood him to be an Australian correspondent—asked me to read a phrase which he heard frequently down in the South Pacific to verify the voice, because *he said my voice did not sound anything like the voice he heard in the South Pacific*. I read this one phrase. I have forgotten what the phrase was.

Q. What did he say, if anything, after you read the phrase?

Mr. DeWolfe. I object to it as hearsay.

The Court. Clearly hearsay. The objection will be sustained.”

* * * * *

“The Court. The court is prepared to rule. I will sustain the objection. Lay a foundation for any question. Protect your record.

Mr. Collins. Q. Did the Australian correspondent make any statement to you after you had read this phrase at his request in the presence of United States correspondents who were in the uniform of the United States army at the Bund Hotel interview you had with correspondents on September 5, 1945?

A. Yes, he said, *he told me that the voice was nothing like what he heard in the South Pacific*.

Mr. DeWolfe. I move that it go out as hearsay and a conclusion.

The Court. Let it go out. The jury will disregard it. The objection is sustained.”

Page 234.

Defendant, XLVII-5209:15-5212:15.

Mr. Collins. Q. Now, Mrs. D'Aquino, just prior to your release from Sugamo Prison in Tokyo on October 25 of 1946, did you have a conversation with Major Swanson, who was one of the prison authorities at Sugamo jail, concerning your release?

A. Yes, I did.

Q. Was anybody else present besides yourself and Major Swanson?

A. Yes, there was a Sergeant Hennecke.

Q. And can you tell us what date that conversation took place?

A. It was October 25, about 11 o'clock in the morning, 1946.

Q. Yes. Will you state what that conversation was?

Mr. DeWolfe. Objected to as hearsay, sir.

The Court. Sustained.

Mr. Collins. Q. Well, on or about October 25 of 1946, just prior to your release from Sugamo prison, were you informed by any prison authorities of the terms and conditions of your release?

A. Yes, I was.

Q. By whom?

A. By Major Austin Swanson.

Q. And when was that?

A. That was at 11 o'clock in the morning of October 25 of 1946.

Q. What did he state?

Mr. DeWolfe. Objected to as incompetent, irrelevant and immaterial, hearsay.

The Court. Objection sustained.

Mr. Collins. Q. Were you informed at that time and place by Major Swanson whether or not the Attorney General of the United States acquiesced and consented to your liberation from prison?

Mr. DeWolfe. Object to that as being hearsay, calling for a conclusion.

The Court. Objection sustained.

Mr. Collins. Q. Were you informed at that time and place by Major Swanson of Sugamo Prison whether or not the State Department, the United States State Department, acquiesced in your liberation?

Mr. DeWolfe. Objected to as hearsay, incompetent.

The Court. Objection sustained.

Mr. Collins. And we make an offer proof through this witness, if your Honor please, that on or about October 24 or 25 of 1946——

Mr. DeWolfe. Object to any offer of proof as being incompetent.

The Court. The court has already ruled on that matter.

Mr. Collins. That is a different matter.

The Court. The court has already ruled. Proceed with this witness.

Mr. Collins. Yes. We make this offer of proof.

Q. Isn't it a fact, Mrs. D'Aquino——

The Court. Now just a moment. The court has indicated to you clearly that it cannot accept an offer of proof. You are limited to the witness on the stand and you may examine her on any matter that you see fit.

Q. Were you informed at the time of your liberation from Sugamo prison by Major Swanson on or about October 25, 1946 that the United States Attorney General, Justice Department and State Department acquiesced in

and consented to your liberation from Sugamo prison by the army?

Mr. DeWolfe. I object to that as incompetent, irrelevant and immaterial; hearsay; leading and calling for a conclusion.

The Court. Objection sustained.

Mr. Collins. That constitutes the matter we desired to cover by an offer of proof. My understanding is that now Your Honor bars us from making——

The Court. There is nothing before the Court. Proceed.

Mr. Collins. Then I make the following offer of proof on that point, that if the witness were permitted to answer the question propounded, her answer would be "yes".

Page 235.

Ito, XL-4527:16-4529:2.

Q. In 1944 and 1945 you had conversations with Miss Toguri about her work at Radio station, is that correct?

A. Yes, it is.

Q. And substantially the conversations were along the same lines? She said the same thing about her work, is that correct?

A. Radio work?

Q. Yes.

A. What kind of things?

Q. You tell me.

Mr. Collins. I object to that, if Your Honor please; there has been no testimony elicited from the witness on direct examination that related in any wise to the defendant's work at Radio Tokyo.

Mr. DeWolfe. He went into all kinds of conversations about her actions and this is proper cross-examination on the other conversations.

The Court. If my memory serves me correctly, there was no testimony developed concerning any conversations in relation to her work at the radio station. I may be in error, but I don't recall any.

Mr. DeWolfe. I don't recall any either, sir. He went into conversations about returning, about food, war, Japanese, and about citizenship. We think we are entitled to cross-examine this witness about any conversation that she had with the defendant.

The Court. If there is any doubt about it, let's have the record read.

(Record read.)

The Court. You are assuming something not in evidence.

Mr. DeWolfe. Did you talk to her about her radio work?

Mr. Collins. I object on the ground it is improper cross-examination and it is assuming a fact not in evidence. It is incompetent, irrelevant and immaterial.

The Court. Objection overruled. Read the question.

(Record read.)

The Court. You may answer.

A. Yes, once in a while.

Page 236.

Ito, XL-4538:20-4539:7.

"Q. And you both stated to each other you were afraid you might be interned upon your return to the United States; therefore neither one of you was anxious to come back, isn't that correct?

Mr. Collins. I object to that on the ground that is assuming something not in evidence, and on the further ground it is not proper impeachment; on the further ground no foundation has been laid; and on the further ground it is improper cross-examination and is incompetent, irrelevant and immaterial.

The Court. The objection will be overruled. Read the question.

(Question read.)

Mr. DeWolfe. Q. That is about right, isn't it?

A. Yes."

Page 237.

Pray, XLIII-4711:11-4712:4.

"Mr. Collins. Q. Now, during that period of time was the defendant permitted to send mail to the United States?

Mr. DeWolfe. Objected to as incompetent, irrelevant and immaterial.

The Court. Objection sustained.

Mr. Collins. Q. During that period of time was the defendant permitted to receive mail from the United States?

Mr. DeWolfe. Same objection, sir.

The Court. Same ruling.

Mr. Collins. Q. During the period of time that you were at Sugamo jail, was the defendant permitted to write either postcards or letters to her husband?

Mr. DeWolfe. Objected to as immaterial, incompetent.

The Court. Objection sustained.

Mr. Collins. Q. Now, during that period of time was the defendant permitted to receive mail from her husband, if you know?

Mr. DeWolfe. Objected to as immaterial, incompetent.

The Court. Objection sustained."

Page 240.

Reyes, XXXIII, 3747:6-3748:9.

Q. I read this statement from exhibit 52, which you say is true: "Toguri did not at any time express to me any fear she had of the Japanese government or people who supervised her work." Is that statement true or false?

A. That statement is inaccurate, sir.

Q. It is not true, is it?

A. At the time I made that statement, that was the——

Q. It is not true, is it, Witness Reyes?

Mr. Collins. Just a moment, Mr. Witness, we ask for a court ruling on that. The witness has not been given an opportunity to answer, and counsel's questions are argumentative and bullying.

The Court. Read the question.

(Question read.)

The Court. You may answer that question.

A. I answered the question. That statement is true, and I understand I am given the privilege of adding an explanation?

The Court. You may explain it.

The Witness. If I may, sir, I said many times to these two gentlemen of the F.B.I. that I had heard the defendant say to me on many occasions under many different circumstances that she was afraid of the Japanese Army, and the circumstances under which she had to work; and I was asked again and again if I could recall specific instances when she did say this, who was there, and at the time of this questioning and under the conditions and the atmosphere of this questioning, I could not recall any specific instances. This was the language put into the statement not by myself, and I signed that statement.

Page 240.

Reyes, XXXIII-3769:20-3771:6.

Mr. DeWolfe. Q. Did you sign any other statement at San Francisco that is false?

Mr. Collins. I object, if Your Honor please. The statement itself would be the best evidence.

The Court. Lay the foundation for it.

Mr. DeWolfe. Q. Did you sign any other statement in San Francisco before the Federal Bureau of Investigation?

A. I did, sir.

Q. Are there false statements in that statement?

Mr. Collins. I object to that, if Your Honor please, on the ground no foundation has been laid. The statement itself is the best evidence.

The Court. The objection may be overruled. He may answer.

The Witness. I can't remember without seeing the statement, sir.

Mr. DeWolfe. Q. You have to look at the statement to see whether or not you have something in there over your signature that is false?

A. Yes, sir. May I explain why?

Mr. Collins. I object to that as purely argumentative.

Mr. DeWolfe. No, answer the question.

A. Yes, sir.

Mr. Collins. Just a moment. We ask for a ruling of the Court on that. The objection is that the question is absolutely argumentative.

The Court. Read the question.

(Question read.)

Mr. Collins. Object on the further ground that no foundation has been laid.

The Court. The objection is overruled.

Mr. Collins. Improper impeaching question.

The Court. You may answer.

A. The answer is "Yes".

Page 240.

Reyes, XXXIII-3776:5-17.

Q. About 9. Did you broadcast your own prisoner of war message?

A. I did.

Q. Remember what you said in it?

A. Partially, yes.

Q. Did you make laudatory references to the Japanese program of rehabilitation in Manila?

Mr. Collins. I submit, if your Honor please, the message itself is the best evidence of its own content; no foundation has been laid, it is incompetent, irrelevant and immaterial.

The Court. The objection will be overruled. He may answer.

A. I may have, sir.

Page 241.

Reyes, XXXIV-3868:6-24; 3869:19-3870:8.

Mr. DeWolfe. Does exhibit 62 purport to be a script of the Zero Hour?

Mr. Collins. I submit, if your Honor please, that that calls for the opinion and conclusion of the witness. The document delivered here is a photostat of some document.

The Court. If he knows, he may answer. The objection will be overruled.

A. The question again, please?

Mr. Collins. We object to the question on the ground that it asks for what the document purports to be, which would not be within the——

The Court. Read the question.

(Question read.)

Mr. Collins. I object on the ground it is calling for the opinion and conclusion of the witness as to what it purports to be.

The Court. The objection will be overruled; he may answer.

A. It says here on this photostat copy, "The Zero Hour", so I suppose that purports to be a Zero Hour script.

* * * * *

Q. Exhibit 63, on behalf of the United States for identification; that purports to be a complete Zero Hour script, doesn't it?

(Handing to witness.)

Mr. Collins. I submit, if your Honor please, that what it purports to be is incompetent, irrelevant and immaterial and is calling for the opinion and conclusion of the witness, and on the further ground that it is not the best evidence, and that no foundation has been laid for the introduction of any such testimony.

The Court. If he knows he may answer. The objection will be overruled.

A. What was the question, please?

The Court. Read it.

(Record read.)

A. It says on the first page, "Zero Hour".





